87-182

No.

Supreme Court, U.S.
FILED
JUL 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

ALOE COAL COMPANY and COMMERCIAL UNION INSURANCE COMPANY,

Petitioners,

vs.

CLARK EQUIPMENT COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STEPHEN A. COZEN
A Member of the Bar of this Court
DAVID J. GROTH
SUSAN M. DANIELSKI
RICHARD C. BENNETT
KATHIE D. KING
COZEN and O'CONNOR
Attorneys for Petitioners
1900 Market Street
The Atrium - Third Floor
Philadelphia, Pennsylvania 19103
(215) 665-2000

5928
Lits Appellate Printers, Inc. • NJ (201) 257-6850 • (800) 3 APPEAL • NY (212) 340-4640 • MA (617) 542-1114
DC (202) 783-7288 • PA (215) 925-6500 • USA (800) 5 APPEAL

QUESTION PRESENTED FOR REVIEW

Under the *Erie* doctrine, in a diversity case applying state law, may a federal court, in the absence of a controlling state supreme court decision, disregard state appellate precedents which are binding on the state courts, in favor of a federal common-law rule?

STATEMENT OF CORPORATE AFFILIATION

Commercial Union Insurance Company's parent company is Commercial Union Assurance Company, P.L.C., domiciled in the United Kingdom, all subsidiaries of Commercial Union Insurance Company are wholly owned. Aloe Coal Company has no parent, subsidiary or affiliated corporations.

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents ii

Table of Citations iii

Opinions Below 1

Statement of Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 3

Jurisdiction of the Courts Below 4

Reasons for Granting the Writ 5

The decision of the Third Circuit conflicts with previous decisions of this Court construing federal law. 5

A. The *Erie* Doctrine 6

B. Controlling State Precedent 11

C. The Pennsylvania Courts Are Bound by the Decisions of the Pennsylvania Superior Court and Under *Erie* the Federal Courts Must Apply these Rulings 15

Conclusion 19

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Baker v. Aetna Casualty & Surety Co., 309 Pa. Super. 81, 454 A.2d 1092 (1982) 17

Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. 198 (1956) 7

Byrd v. Blue Ridge Rural Electrical Cooperative, Inc., 356 U.S. 525 (1958) 7

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 7

Commissioner v. Estate of Bosch, 387 U.S. 456 (1967) ...5, 7

Commonwealth v. Ewansik, 360 Pa. Super. 476, 520 A.2d 1189 (1987) 17

Cornell Drilling Co. v. Ford Motor Co., 241 Pa. Super. 129, 359 A.2d 822 (1976) 12

East River S.S. Corp. v. Transamerica Delaval, Inc., ____ U.S. ____, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986) 4, 5, 11, 14, 17

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) .....i, 5, 6, 7, 11, 14, 15, 17, 18, 19

Fidelity Union Trust Co. v. Field, 311 U.S. 169 (1940) 5, 7, 8, 9, 10

Contents

Page

Guaranty Trust Co. of New York v. York, 326 U.S. 99 (1945) 5, 10

Hanna v. Plumer, 380 U.S. 460 (1965) 7

In re Townsend's Trust, 349 Pa. 162, 36 A.2d 438 (1944) 17

Industrial Uniform Rental Co. v. International Harvester Co., 317 Pa. Super. 65, 463 A.2d 1085 (1983) 13

Jarvis v. Johnson, 668 F.2d 740 (3d Cir. 1982) 3

Johnson v. General Motors Corp., 349 Pa. Super. 147, 502 A.2d 1317 (1986) 13, 14

Kassab v. Central Soya, 432 Pa. 217, 246 A.2d 848 (1968) 12, 15

King v. Order of United Commercial Travelers of America, 333 U.S. 153 (1948) 5, 10, 15

Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941) 10

MacDougall v. Ford Motor Co., 214 Pa. Super. 384, 257 A.2d 676 (1969) 12

Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165 (3d Cir. 1981) 4, 11, 12, 14, 16

Russell v. Todd, 309 U.S. 280 (1940) 5, 7

Contents

Page

Six Companies of California v. Joint Highway District No. 13 of the State of California, 311 U.S. 180 (1940) 5, 10, 15

Stoner v. New York Life Insurance Co., 311 U.S. 464 (1940) 5, 10

Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) 6, 15

Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941) 10

Van Dusen v. Barrack, 376 U.S. 612 (1964) 5

West v. American Telephone & Telegraph Co., 311 U.S. 223 (1940) 5, 9, 10

Woods v. Interstate Realty Co., 337 U.S. 535 (1949) 5, 10

Statutes Cited:

28 U.S.C. § 1291 4

28 U.S.C. § 1332(a)(1)..... 4

28 U.S.C. § 1652 .....2, 5

28 U.S.C. § 2101(c) 2

42 Pa. Cons. Stat. Ann. §§ 542-44..... 16

42 Pa. Cons. Stat. Ann. § 742 16

Contents

Page

Rules Cited:

Federal Rule of Appellate Procedure 28(j) 4

Pa.R.A.P. 238 3

Pa.R.A.P. 1114 9

Pa.R.A.P. 3101 16

Supreme Court Rule 17.1(c) 19

United States Constitution Cited:

Amendment X 2, 5, 14, 18, 19

Other Authorities Cited:

Third Circuit Internal Operating Procedure 8c 16

Pennsylvania Superior Court Internal Operating Procedure 9 16

APPENDIX

Appendix A—Opinion of the United States Court of Appeals for the Third Circuit, *Aloe Coal Co. v. Clark Equipment Co.*, No. 86-3488, April 8, 1987 ..... 1a

Appendix B—Order of the United States Court of Appeals for the Third Circuit, *Aloe Coal Co. v. Clark Equipment Co.*, No. 86-3488, May 4, 1987 ..... 22a

Contents

Page

Appendix C—Order of the United States District Court for the Western District of Pennsylvania, *Aloe Coal Co. v. Clark Equipment Co.*, Civil Action No. 83-1329, September 29, 1986 ..... 24a

Appendix D—Order of the United States District Court for the Western District of Pennsylvania, *Aloe Coal Co. v. Clark Equipment Co.*, Civil Action No. 83-1329, July 16, 1986 ..... 26a

Appendix E—Internal Operating Procedures of the Superior Court of Pennsylvania 28a

No.

In The

Supreme Court of the United States

October Term, 1987

ALOE COAL COMPANY and COMMERCIAL UNION INSURANCE COMPANY,

Petitioners,

vs.

CLARK EQUPMENT COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit in *Aloe Coal Company v. Clark Equipment Company* is reported at 816 F.2d 110 (3d Cir. 1987). The orders of the United States District Court for the Western District of Pennsylvania denying the post-trial motions and entering judgment are unreported. The decision and orders are included in the appendix.

STATEMENT OF JURISDICTION

The United States Court of Appeals denied the petition for rehearing and suggestions for rehearing en banc on May 4, 1987. The petition for rehearing was filed on April 22, 1987, fourteen days after the Third Circuit's decision of April 8, 1987.

This Court's jurisdiction is based upon 28 U.S.C. § 2101(c) as this is a petition for a writ of certiorari intended to bring before the Court a judgment in a civil action rendered by the United States Court of Appeals for the Third Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment X to the Constitution of the United States which provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Rules of Decision Act of 1789 codified at 28 U.S.C. § 1652 which provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

This civil diversity action was commenced by Aloe Coal Company, a Pennsylvania corporation, and its insurer, Commercial Union Insurance Company, a Massachusetts corporation. The defendant was Clark Equipment Company, a Michigan company, the manufacturer of a tractor shovel owned by Aloe Coal. The tractor shovel burst into flames while in operation; the only damages sustained were limited to the tractor shovel itself. The suit by Aloe Coal and Commercial Union against Clark alleged that Clark's negligence, strict products liability and breach of warranty in the design, sale and manufacture of the tractor shovel were the cause of the blaze.

At trial, Aloe Coal and Commercial Union proceeded upon the negligence theory alone, alleging that Clark's knowledge of similar fires in the same model of the tractor shovel which Aloe Coal owned imposed a duty upon Clark to warn Aloe Coal of the propensity for such fires. The jury found in favor of Aloe Coal by finding Clark 65% negligent and Aloe Coal 35% negligent. The damages were uncontested, and judgment was entered in accordance with the verdict.

Clark's post-trial motions were denied and Aloe Coal moved to mold the verdict to add delay damages under Pennsylvania Rule of Civil Procedure 238.[1] Clark prosecuted a timely appeal to the United States Court of Appeals for the Third Circuit, raising the issue of whether damages limited to the product itself are recoverable in tort under Pennsylvania law.

---

1. Under Pa.R.C.P. 238, petitioner was entitled to damages for delay at ten percent per annum if the damages awarded were more than 125 percent of the respondent's highest written offer. The rule is applied in diversity cases governed by Pennsylvania law. *Jarvis v. Johnson*, 668 F.2d 740 (3d Cir. 1982).

Pursuant to a letter to the court under Federal Rule of Appellate Procedure 28(j), Clark brought this Court's decision in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, ____ U.S. ____, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986), to the attention of the panel. In *East River,* this Court ruled that damage limited to the product itself could not be recovered in tort in an admiralty action. In so ruling, this Court refused to follow a previous decision of the Third Circuit construing Pennsylvania law, *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, 652 F.2d 1165 (3d Cir. 1981), where the Third Circuit predicted that Pennsylvania law would allow recovery for damage to the product itself where the damages were caused by an untoward occurrence or a calamitous event such as a fire.[2]

On appeal in this case, the Third Circuit predicted that the Pennsylvania Supreme Court would follow the decision of this Court in *East River* rather than the previous decision of the Third Circuit in *Pennsylvania Glass Sand*. In making this prediction, the Third Circuit ignored and discounted a number of decisions by the Pennsylvania Superior Court, the Commonwealth's intermediate appellate court.

JURISDICTION OF THE COURTS BELOW

Jurisdiction in the district court was based upon the parties' diverse citizenship and an amount in controversy in excess of $10,000, pursuant to 28 U.S.C. § 1332(a)(1). Jurisdiction of the Court of Appeals was based on 28 U.S.C. § 1291 as the appeal was from a final judgment of the United States District Court for the Western District of Pennsylvania.

---

2. In fact, the *Pennsylvania Glass Sand* case also concerned a fire in a front end loader where only the equipment was damaged.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE THIRD CIRCUIT CONFLICTS WITH PREVIOUS DECISIONS OF THIS COURT CONSTRUING FEDERAL LAW.

The decision of the Third Circuit in this case, predicting that *East River* would be adopted as Pennsylvania law, conflicts with the decision of this Court in *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), and those cases construing the *Erie* decision. As *Erie* holds, the tenth amendment and the Rules of Decision Act[3] compel the application of state law in diversity cases to maintain parity between state and federal litigants. By predicting that *East River* would be followed as Pennsylvania law in the face of contrary state precedents, the Third Circuit has ignored *Erie* and implicitly sanctioned a return to the use of federal common-law in diversity cases.[4]

---

3. Passed by the First Congress in 1789, the Act is now codified at 28 U.S.C. § 1652.

4. The ruling of the Third Circuit also conflicts with a number of decisions of this Court interpreting how *Erie* is to be applied and how state law is to be determined under *Erie. Russell v. Todd,* 309 U.S. 280 (1940); *Fidelity Union Trust Co. v. Field,* 311 U.S. 169 (1940); *Six Companies of California v. Joint Highway District No. 13 of the State of California,* 311 U.S. 180 (1940); *West v. American Telephone & Telegraph Co.,* 311 U.S. 223 (1940); *Stoner v. New York Life Insurance Co.,* 311 U.S. 464 (1940); *Guaranty Trust Co. of New York v. York,* 326 U.S. 99 (1945); *King v. Order of United Commercial Travelers of America,* 333 U.S. 153 (1948), and *Woods v. Interstate Realty Co.,* 337 U.S. 535 (1949). *See also, Commissioner v. Estate of Bosch,* 387 U.S. 456 (1967); *Van Dusen v. Barrack,* 376 U.S. 612 (1964).

A. The *Erie* Doctrine

The application of state common-law to diversity cases was first mandated by this Court in *Erie*. Overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), this Court recharted the course from application of federal common-law in diversity actions to application of state law. Writing for the Court, Justice Brandeis found that the Rules of Decision Act and constitutional principles required the application not only of state statutes in federal diversity cases, but the rules of common law applicable in the several states, specifically the law as interpreted by the courts of the states. 304 U.S. at 72-73. The result sought to be avoided in overruling *Swift* in the *Erie* case was summarized by Justice Brandeis as follows:

> Swift v. Tyson introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State.

Id. at 74-75 (footnote omitted). Since *Swift* has been overruled and *Erie* has been the applicable law, this Court has had myriad opportunities to discuss how state law is to be determined. The majority of rulings by the Court on this issue were decided shortly

after the *Erie* decision and generally set forth the applicable rules for determining state law.[5]

In *Russell v. Todd,* 309 U.S. 280 (1940), the Court was presented with a question that had not been decided by New York's highest court, although the state intermediate appellate court, the Appellate Division of the Supreme Court, had ruled on the issue following analogous precedents of the New York Court of Appeals. Deciding how state law was to be determined, Justice Stone stated:

> In the absence of a definitive ruling by the highest court of the state, we accept the decision of the Appellate Division and the reasoning of the Court of Appeals upon which it rests as persuasive that the three-year statute does not apply to suits like the present where the remedy is exclusively equitable.

Id. at 293. In so ruling, this Court compelled adherence to the precedent of an intermediate appellate court where that court's decision was based upon legal precedent decided by the state's highest court.

Soon after deciding *Russell,* this Court considered a similar issue in *Fidelity Union Trust Co. v. Field,* 311 U.S. 169 (1940), where the question was whether the Third Circuit erred in declining to follow a decision of the New Jersey Chancery Court, a court of general, statewide jurisdiction, but not the state's highest court.

---

5. Since 1948 the decisions of this Court have centered not upon how state substantive law is to be determined under *Erie*, but the distinction between rules of substance and those of procedure and the interrelationship between the federal rules of civil procedure and state procedural doctrines. *See, e.g., Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198 (1956); *Byrd v. Blue Ridge Rural Electrical Cooperative, Inc.*, 356 U.S. 525 (1958), and *Hanna v. Plumer*, 380 U.S. 460 (1965). *But see, Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967).

Writing for a unanimous court, Chief Justice Hughes declared:

> But the majority of the Circuit Court of Appeals took the view that it was not so bound "by the pronouncements of other state courts" but might conclude that "the decision does not truly express the state law."
>
> * * *
>
> We think that this ruling was erroneous. The highest state court is the final authority on state law . . ., but it is still the duty of the federal courts, where the state law supplies the rule of decision, to ascertain and apply that law even though it has not been expounded by the highest court of the State.

Id. at 177 (footnote and citations omitted).

In explaining the ruling of the Court, Chief Justice Hughes discussed the reasons why an intermediate state court might declare state law in the absence of a ruling of the state's highest court, and the reasons why such decisions are binding on the federal courts. Chief Justice Hughes opined that the intermediate state courts are "organs" of the state and that decisions of intermediate courts are often treated as binding in later cases in the absence of precedent or opinion from the state's highest court. The Chief Justice noted that the state's highest court might never reach the issue where there was no conflict between lower courts, or where the state's highest court agreed with the rulings of the lower courts.

This opinion implicitly recognizes that in most jurisdictions, the right of review in the state's highest court is discretionary.[6]

---

6. Pennsylvania Supreme Court review is discretionary in civil actions. (Cont'd)

Because New Jersey's own courts treated the decisions of the court of chancery as binding in the absence of contrary authority, *Fidelity Union* held these precedents must be followed in federal diversity cases to provide a uniform rule for state and federal court litigants. The rule set forth was stated by the Chief Justice as follows:

> An intermediate state court in declaring and applying the state law is acting as an organ of the state and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question.

Id. at 177-78.

Similar issues were presented to the Court in a number of cases decided on the same day as *Fidelity Union*. In *West v. American Telephone & Telegraph Co.*, 311 U.S. 223 (1940), the purpose underlying application of state law and the binding nature of precedents of intermediate state courts was more fully explained by Justice Stone:

> A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of this state has never passed upon them. In those circumstances

---

(Cont'd)

Pa.R.A.P. 1114. In 1985, the latest year for which statistics are available, the Pennsylvania Supreme Court granted only 8.6 percent of all petitions for review filed in civil cases. 1985 Annual Report Administrative Office of Pennsylvania Courts.

> a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable.

Id. at 236-37. The applicable rule required the federal courts to follow the decision of a state intermediate appellate court in the absence of "other persuasive data" that the highest court of the state would rule to the contrary.

The third case decided on the same day as *Fidelity Union* and *West* was *Six Cos. of California v. Joint Highway District No. 13 of the State of California,* 311 U.S. 180 (1940), in which this Court ruled that in the absence of disapproval or "convincing evidence" that state law was considered "otherwise," the circuit court of appeals should have followed the decision of the state intermediate appellate court.[7]

---

7. *See Stoner v. New York Life Insurance Co.*, 311 U.S. 464 (1940), which reaches the same conclusions based upon the same reasoning. *See also, Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941); *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941); *Guaranty Trust Co. of New York v. York*, 326 U.S. 99 (1945); *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949). These decisions must be contrasted with *King v. Order of United Commercial Travelers of America*, 333 U.S. 153 (1948), where state trial court precedents were held non-binding. The decisions at issue were those of the Court of Common Pleas of South Carolina, South Carolina's trial courts. The reasoning articulated by the Court for refusing to follow the South Carolina trial court decisions was that those decisions were not binding on other South Carolina courts of coordinate jurisdiction.

> [A] Court of Common Pleas does not appear to have such importance and competence within South Carolina's own judicial system that its decisions should be taken as authoritative expositions of that State's "law."

Id. at 161.

For nearly forty years, this Court has not chosen to review the application of the *Erie* rule in the context of controlling state intermediate appellate court rulings and their application under the *Erie* doctrine. Petitioners suggest that this case deserves the Court's attention to "revisit" *Erie* in light of the Third Circuit's clear violation of the principles enunciated by this Court in its *Erie* decisions.

B. Controlling State Precedent

In deciding that Pennsylvania would follow the admiralty ruling of this Court in *East River*, the Third Circuit ignored its own prior decision on exactly the same issue, *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, which carefully considered Pennsylvania law and the precedents of Pennsylvania's highest court. The circuit court also ignored convincing evidence that the Pennsylvania Supreme Court would follow the rule set forth in *Pennsylvania Glass Sand,* as evidenced by decisions of the state's intermediate appellate court.

Pennsylvania Glass Sand represents a comprehensive analysis of Pennsylvania products liability decisions, as well as the general commentary, and cases in other jurisdictions considering the issue—whether recovery may be had in tort for damage to the product itself. The analysis considered a decision of the Pennsylvania Supreme Court which discussed the issue.

> Using the example of an exploding gas stove, the court opined that under § 402A a plaintiff could recover the cost of repairing or replacing the stove. Noting that replacement costs for the defective product itself are sometimes referred to as "economic loss," the court stated that there "would seem to be no reason for excluding this measure of damages" in a 402A action, "since the

> defective product is as much 'property' as any other possession of the plaintiff that is damaged as a result of the manufacturing flaw."

652 F.2d at 1168 quoting *Kassab v. Central Soya,* 432 Pa. 217, 231 n.7, 246 A.2d 848, 854 (1968). Concluding its analysis of *Kassab* and the other authorities considered, the Third Circuit stated:

> The thrust of the dicta in *Kassab* was that hazardous products which cause damage to themselves are analytically encompassed within the policy of tort law to the same extent as dangerous items that also accidently maim people or other property . . . . We therefore believe that the Pennsylvania Supreme Court would draw a distinction between the type of injury to a defective product that constitutes mere economic loss, and the type of injury that amounts to the sort of physical harm traditionally compensable in tort.

Id. at 1173 (footnotes omitted).

In reaching its decision in *Pennsylvania Glass Sand,* the Third Circuit also relied upon a number of Pennsylvania Superior Court decisions, Pennsylvania's intermediate appellate court. *Cornell Drilling Co. v. Ford Motor Co.,* 241 Pa. Super. 129, 359 A.2d 822 (1976), and *MacDougall v. Ford Motor Co.,* 214 Pa. Super. 384, 257 A.2d 676 (1969), two cases where recovery was allowed for the damage solely to the defective product itself.

Since the decision in *Pennsylvania Glass Sand,* the Pennsylvania Supreme Court has not considered the issue, and the discussion in *Kassab* remains as its only source of guidance to the lower state courts and the federal courts. The Pennsylvania

Superior Court has addressed the issue in two cases which adopt the rule that where damage to the product itself arises from a product defect hazardous to persons or property and unreasonably dangerous, there may be recovery for damage to the product itself.

In *Industrial Uniform Rental Co. v. International Harvester Co.*, 317 Pa.Super. 65, 463 A.2d 1085 (1983), the court performed the same analysis undertaken by the Third Circuit in Pennsylvania Glass Sand and adopted the following rule:

> In an action between commercial enterprises, where defective design, manufacture and sale of a product is alleged, where there is nothing in the record to indicate that the defect is a condition potentially dangerous to persons or to property, and where the purported defect results in progressive deterioration of the product itself, the buyer's cause of action for its economic losses against the seller is in breach of warranty under the UCC.

Id. at 79-80, 463 A.2d at 1093. Although the court did not specifically state that a dangerous condition will allow recovery, it did rule that in the absence of such allegations, the remedy is limited to a breach of warranty action.

In a succeeding decision, *Johnson v. General Motors Corp.*, 349 Pa. Super. 147, 502 A.2d 1317 (1986), the Superior Court made clear its ruling in *Industrial Uniform.*

> [W]e must read appellant's complaint with a view to determining whether she states that the allegedly defective transmission is unreasonably dangerous (thus implicating tort law) or whether it is simply unfit for its intended use or failed to meet appellant's expectations (thus implicating warranty law).

Id. at 157, 502 A.2d at 1322-23. The court stated that injury or damage compensable in tort included damage to the product itself when that damage is occasioned by an unreasonable risk of harm.

> Appellant has failed to assert that the alleged defects in her automobile's transmission made it unreasonably dangerous to the detriment of persons or property. The transmission prematurely wore out; appellant pleads no unexpected occurrence that harmed anyone or anything, including the automobile itself.

Id. at 159, 502 A.2d at 1323. The court also noted that its decision applies to actions both alleging strict products liability and those actions where negligence principles govern, as was the case in *Aloe*. *Id.* at 156 n.10, 502 A.2d at 1321.

This judicial history of recovery for "economic loss" did not present the *Aloe Coal* panel with any evidence that its 1981 prediction was wide of the mark. Indeed, the rule that there may be recovery for damage to the product itself was strengthened and bolstered in the period between the Third Circuit's 1981 decision in *Pennsylvania Glass Sand* and its 1987 decision in *Aloe Coal*. Although this Court adopted a contrary rule for admiralty claims in *East River*, that decision rests upon federal common-law. Diversity jurisdiction, the Rules of Decision Act and the tenth amendment were not implicated.

The Third Circuit's decision to follow *East River* amounts to a usurpation of the function of the states and their courts under the *Erie* doctrine. As such, it contravenes prior rulings of this Court which mandate that the federal courts apply the rulings of state intermediate appellate courts in the absence of other

compelling or convincing evidence that the highest court of a state would rule to the contrary.[8]

C. The Pennsylvania Courts Are Bound by the Decisions of the Pennsylvania Superior Court and Under *Erie* the Federal Courts Must Apply these Rulings.

There is another compelling reason why this Court should grant this petition. Under Pennsylvania law, the state courts are bound to follow the rulings of the Superior Court. The federal district courts, however, are bound by another master—the court of appeals. This will result in the application, in diversity cases, of a rule different from and opposite to the rule applicable in state courts. State court litigants will be permitted to recover for damage to the product itself; diversity litigants theoretically governed by the same law will be barred. This lack of uniformity was the reason the Court overruled *Swift v. Tyson*. For the same reason, this Court should set federal application of state law back on its proper course by requiring adherence in the federal courts to the same precedents binding in the state courts.

In the cases interpreting how state law is to be determined under *Erie*, the Court has relied upon the weight and force accorded to the decisions of intermediate appellate courts by other state courts. In Pennsylvania, the decisions of the Superior Court

---

8. The Pennsylvania Supreme Court decided *Kassab* in 1968, and the Pennsylvania courts, without exception, have followed *Kassab* since that time. This nineteen-year span since *Kassab* is approximately the same period of time which passed between the decisions of the state courts in *Six Cos. of California v. Joint Highway District*, where this Court found sufficiently convincing a twenty-one year span of undisturbed lower court rulings to hold that the precedents in those cases should be followed as the law of the state under the *Erie* doctrine. And unlike *King*, the only *Erie* decision which refused application of lower state court precedent, the decisions of the intermediate state court at issue must be followed by other Pennsylvania state courts.

are binding on lower state courts, and are considered binding as the law of Pennsylvania. This Court has also considered the nature of the court and its procedures. Pennsylvania's Superior Court is a court of general, appellate jurisdiction which operates on a statewide basis. Unlike intermediate courts of appeals in other states, the court is not divided into districts or divisions. Although the judges sit in panels, those panels are comprised of judges of the Superior Court elected on a statewide basis. *See generally,* 42 Pa. Cons. Stat. Ann §§ 542-44 & 742; Pa.R.A.P. 3101. Under the Superior Court's internal operating procedures, one panel of the Superior Court should not overrule another panel, and indeed, before any opinion is filed, the central legal staff of the Superior Court must formally notify the panel of any conflicting decisions. Pennsylvania Superior Court Internal Operating Procedure 9.[9] *See also,* Third Circuit IOP 8c. In the event the central legal staff issues a memorandum indicating a conflict, the panel may resolve the conflict itself or it may request that the court en banc hear the case. In this respect, the procedures for maintaining uniformity in the law are nearly identical with those adopted by the Third Circuit.[10]

The decisions of Pennsylvania's highest court, the Pennsylvania Supreme Court, hold that the law as declared by the Superior Court is the law of Pennsylvania until the supreme court declares otherwise.

---

9. The Internal Operating Procedures of the Superior Court of Pennsylvania are included in the appendix.

10. The petition for rehearing and suggestions for rehearing en banc filed by the petitioners in this case suggested to the Third Circuit that the panel deciding *Aloe Coal* could not overrule *Pennsylvania Glass Sand* without en banc consideration under Third Circuit IOP 8c. Despite this apparent conflict within the circuit, the majority of the active judges in the Third Circuit failed to vote for en banc consideration.

> [A] lower court has no right to ignore the latest decision of the Superior Court of this Commonwealth on an issue which has been squarely decided. Until that decision should be over-ruled by the Superior Court itself or over-ruled by the Supreme Court, it is still the law of this Commonwealth, regardless of the decisions of any other court in the country, including the Federal courts.

In re Townsend's Trust, 349 Pa. 162, 168, 36 A.2d 438, 441 (1944). *Cited with approval* in *Baker v. Aetna Casualty & Surety Co.,* 309 Pa. Super. 81, 92, 454 A.2d 1092, 1098 (1982), and *Commonwealth v. Ewansik,* 360 Pa. Super. 476, 477, 520 A.2d 1189, 1190 (1987).

Pennsylvania mandates adherence to the decisions of the Superior Court as the law of the Commonwealth. This Court's *Erie* decisions mandate adherence to intermediate appellate court precedent. The ruling of the Third Circuit chooses to ignore these mandates. Instead, the court adopts the federal common-law rule of *East River*, predicting Pennsylvania's highest court would do the same.

> [A]lthough we must accord proper regard to decisions of intermediate state courts, they are not conclusive . . . . Notwithstanding the pronouncements of the Superior Court of Pennsylvania in *Industrial Uniform* and *Johnson,* we recognize that at the time of these holdings, the Superior Court (and the district court here) did not have the benefit of *East River*; their decisions were made before the United States Supreme Court had flatly rejected our holding and rationale in *Pennsylvania Glass Sand.* We remain

> convinced that the Pennsylvania Supreme Court would not accept *Industrial Uniform* and *Johnson* in light of the United States Supreme Court's rejection of *Pennsylvania Glass Sand.*

816 F.2d at 118-19 (citation omitted). The circuit rejects the Superior Court precedents as non-binding. This is contrary to the law of Pennsylvania as articulated by the state supreme court — the law of Pennsylvania is what the Superior Court has held until the Pennsylvania Supreme Court rules otherwise.

The Third Circuit's rejection of this clearly stated precedent of Pennsylvania's highest court usurps the state's absolute right to determine its own law. It usurps the power granted to the Commonwealth by the tenth amendment. It directly conflicts with *Erie,* and *Erie's* reasoning — the choice of a federal or state forum cannot change the substantial rights of the litigants. When the law of the state permits recovery, that same right of recovery must be accorded in the federal courts.

As the Superior Court decisions are binding precedent on Pennsylvania courts, litigants in the state courts will be allowed to recover for damage to the product itself. This same relief will be denied diversity litigants as the district courts are bound to follow the precedent of the Third Circuit in *Aloe Coal.*

As *Erie* so plainly states, the ultimate judicial power of the states is vested in their highest courts. When a state's highest court compels adherence to the decisions of the state's intermediate appellate court, that mandate must be equally binding on the federal courts. These are the teachings of *Erie*, the tenth amendment and the Rules of Decision Act. To do otherwise results in unequal application of state law, and usurps the right of the states to mold and develop their own rules of decision. The *Aloe Coal* decision is the ultimate departure from these principles.

CONCLUSION

The Third Circuit decision is a departure from established federal precedent, and it calls for an exercise of this Court's supervisory powers under Supreme Court Rule 17.1(c). The petitioners respectfully request that this Court grant this petition to determine that the decision of the Third Circuit offends the *Erie* doctrine, equal protection of the laws and the tenth amendment, and direct the Third Circuit to follow the precedents of the Pennsylvania Superior Court, and to reverse its judgment in favor of Clark Equipment Company.

Respectfully submitted,

STEPHEN A. COZEN
A Member of the Bar of this Court
DAVID J. GROTH
SUSAN M. DANIELSKI
RICHARD C. BENNETT
KATHIE D. KING
COZEN AND O'CONNOR
Attorneys for Petitioners

APPENDIX A—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, *ALOE COAL CO. V. CLARK EQUIPMENT CO.*, NO. 86-3488, APRIL 8, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-3488

ALOE COAL COMPANY
COMMERCIAL UNION INSURANCE COMPANY

vs.

CLARK EQUIPMENT CO.,

Appellant

Appeal from the United States District
Court for the Western District
of Pennsylvania (Pittsburgh)
(D.C. Civil No. 83-1329)

Argued
March 6, 1987
Before: GIBBONS, *Chief Judge*,
SEITZ and ALDISERT, *Circuit Judges*.
(Filed April 8, 1987)

Arthur R. Gorr, Esq. (ARGUED)
Gorr, Dell and Loughney
628 Frick Building
Pittsburgh, PA 15219

COUNSEL FOR APPELLANT

Appendix A

Cozen and O'Connor
Susan M. Danielski, Esq. (ARGUED)
Kathie D. King, Esq.
1900 Market Street
Third Floor - The Atrium
Philadelphia, PA 19103

COUNSEL FOR APPELLEES

OPINION OF THE COURT

ALDISERT, *Circuit Judge*.

This appeal requires us to decide if a sufficient quantum of admissible evidence was presented at trial to establish a prima facie case of negligence. We determine that plaintiff-appellee Aloe Coal Company did not present sufficient evidence of causation to submit its negligence claim to the jury.

We also visit again the issue that was before us in *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, 652 F.2d 1165 (3d Cir. 1981): whether Pennsylvania courts would permit a purchaser of industrial equipment to bring a tort action against the manufacturer for damages to the product caused by a sudden fire.

When the damages issue was here before we recognized that Pennsylvania had not yet settled the question of whether injury to an allegedly defective product itself was compensable in tort. We identified the majority rule, set forth in *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), which seeks to preserve a proper role for the law of warranty by precluding tort liability if a defective product injures only itself, causing purely economic loss. The decision in *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965), embodies the

minority approach. That case held that a manufacturer's duty to make nondefective products encompasses injury to the product itself, whether or not the defect creates an unreasonable risk of harm. In *Pennsylvania Glass Sand*, our court fashioned an intermediate position by declaring that whether product damages are classified as economic loss, and therefore not recoverable in tort but only under contract precepts, depends on the nature of the defect, the type of risk, and the manner in which the injury arose.

In the context of admiralty law, the Supreme Court in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, ___ U.S. ___ (54 U.S.L.W. 4649, June 16, 1986), specifically rejected our *Pennsylvania Glass Sand* position. We now predict that Pennsylvania courts, although not bound to do so, would nevertheless adopt as state law the Supreme Court's reasoning in *East River*. Accordingly, we hold that fire damage to the product here is not recoverable under Pennsylvania law on a theory of negligence; the buyer's remedies are limited to those available under the law of warranty. Therefore, we will reverse the district court's denial of defendant-appellant Clark Equipment Company's motion for judgment notwithstanding the verdict and remand these proceedings to the district court with a direction that it enter judgment in favor of Clark as a matter of law.

I.

In 1977 Aloe Coal Company, a strip mine operator, purchased a tractor shovel manufactured by Clark Equipment Company. After Aloe extensively used the tractor shovel for approximately five years, it was destroyed by a fire of unknown origin. Commercial Union Insurance Company, Aloe's insurer, reimbursed

Aloe for the full amount of the loss and subsequently filed suit against Clark in the district court based on three theories: negligence, strict liability, and breach of warranty. The district court exercised diversity jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332, and applied Pennsylvania substantive law to the controversy. The case went to the jury on the negligence theory only, and in response to special interrogatories, the jury found Clark sixty-five percent negligent and the plaintiffs thirty-five percent negligent. Judgment was entered accordingly.

On May 16, 1986, Aloe filed a motion to mold the jury verdict to include delay damages under Rule 238, Pa.R. Civ. P. Thereafter, Clark filed a motion for judgment n.o.v. or, in the alternative, for a new trial, which was denied by the district court on July 16, 1986. On August 12, 1986, Clark filed a notice of appeal from the July 16 order while Aloe's May 16 motion was still pending before the district court. On September 29, 1986, the district court granted Aloe's May 16 motion; Clark did not file a new notice of appeal.

II.

As a preliminary matter, we address *sua sponte* the issue of our appellate jurisdiction. The matter that gives us reason to pause is the pendency of Aloe's post-judgment motion in the district court at the time Clark filed its only notice of appeal. If that motion was a Rule 59(e), F.R. Civ. P., motion to alter or amend the district court's judgment, Clark's notice of appeal would have been a nullity and appellate jurisdiction over this case would be absent. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982); Rule 4(a)(4), F.R. App. P. If, however, Aloe's motion was a Rule 60(a), F.R. Civ. P., motion to correct a clerical

error, the time for appeal would not have been suspended and our appellate jurisdiction would be proper. *See Barris v. Bob's Drag Chutes & Safety Equipment, Inc.*, 717 F.2d 52, 55 (3d Cir. 1983). We find Aloe's post-trial motion to have been in the nature of a Rule 60(a) motion and hence conclude that we have appellate jurisdiction over this case.

A.

The caption to Aloe's motion described it as "PLAINTIFFS' MOTION TO MOLD JURY VERDICT TO INCLUDE DAMAGES FOR DELAY UNDER Pa.R.C.P. 238," and made no reference to the federal procedural rule under which it was submitted. In paragraph four, however, the motion recited that it was "being filed within the ten-day time period specified in F.R.C.P. 59(e) with respect to Motions to alter or amend judgments." Even were we to take this recital to evidence an intent on Aloe's part to submit the motion pursuant to Rule 59(e), it would not be controlling for the purposes of Rule 4(a), F.R. App. P. "The focus . . . is on the function of the motion, not its caption." *Turner v. Evers*, 726 F.2d 112, 114 (3d Cir. 1984); *see also Glick v. White Motor Co.*, 458 F.2d 1287, 1293-94 (3d Cir. 1972) (district court did not err in entertaining, under Rule 60(a), a motion for prejudgment interest notwithstanding that it was filed under Rule 59(e)). Accordingly, we look to the intended function of Aloe's motion to determine its effect on the time for appeal under Rule 4(a).

Aloe's motion was for the purpose of adding delay damages to its jury verdict pursuant to a Pennsylvania procedural rule, Pa.R. Civ. P. 238. We previously have held that "a post-judgment motion for Rule 238 delay damages is in the nature of a motion to correct clerical mistakes in judgment under Rule 60(a), F.R.Civ.P." *Bob's Drag Chutes*, 717 F.2d at 55. We explained the

reason for this characterization in *Hayden v. Scott Aviation, Inc.*, 684 F.2d 270, 272 (3d Cir. 1982), where we noted that Rule 238 leaves no room for judicial discretion, but involves "a simple clerical matter."[1] *See also Glick*, 458 F.2d at 1294 (omission of prejudgment interest under analogous Michigan law was a clerical error correctable by Rule 60(a) motion). Accordingly, Aloe's motion was governed by Rule 60(a). *See Hayden*, 684 F.2d at 271.

B.

As a motion under the aegis of Rule 60(a), Aloe's post-judgment motion for delay damages had no effect on the time for appeal under Rule 4(a), F.R. App. P. *See Bob's Drag Chutes*, 717 F.2d at 55 (citing *International Controls Corp. v. Vesco*, 556 F.2d 665, 670 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978)); *Harcon Barge Co. v. D & G Boat Rentals, Inc.*, 784 F.2d 665, 668 (5th Cir. 1986) (in banc), *cert. denied*, ___ U.S. ___ (55 U.S.L.W. 3315, Nov. 3, 1986). Clark, therefore, was required to file an appeal within thirty days of July 16, 1986, the date on which Clark's motion for judgment n.o.v. or a new trial was denied. Because Clark filed its notice of appeal on August 12, 1986, within the thirty day period, appellate jurisdiction is properly vested in this court.

III.

Moving to the merits of the present dispute, Clark first contends that the district court erred in denying its motion for judgment n.o.v. because Aloe did not

---

1. The district court entertained Aloe's motion for delay damages prior to the Pennsylvania Supreme Court's decision in *Craig v. Magee Memorial Rehabilitation Center*, 515 A.2d 1350 (Pa. 1986). We express no opinion on the nature of Rule 238 motions made in the wake of *Craig*.

carry its burden of proving that Clark's alleged negligence was the legal cause of the accident.

A.

In examining the district court's denial of appellant's motion for judgment n.o.v. or, in the alternative, for a new trial, we are required to "'view all the evidence and inferences reasonably drawn therefrom in the light most favorable to the party with the verdict.'" *Marino v. Ballestas*, 749 F.2d 162, 167 (3d Cir. 1984) (quoting *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1273 (3d Cir. 1979)). A judgment n.o.v. may be granted under Rule 50(b), F.R. Civ. P., "only if, as a matter of law, 'the record is critically deficient of that minimum quantity of evidence from which a jury might reasonably afford relief.'" *Dudley v. South Jersey Metal, Inc.*, 555 F.2d 96, 101 (3d Cir. 1977) (quoting *Denneny v. Siegel*, 407 F.2d 433, 439 (3d Cir. 1969)); *see also Powell v. J.T. Posey Co.*, 766 F.2d 131, 133-34 (3d Cir. 1985). In considering a motion for judgment n.o.v., a court is not free to weigh the evidence, pass on the credibility of witnesses, or substitute its judgment of the facts for that of the jury. *Blair v. Manhattan Life Insurance Co.*, 692 F.2d 296, 300 (3d Cir. 1982). On appeal, this court applies the same standard as the district court in determining the propriety of a judgment n.o.v. *Powell*, 766 F.2d at 134.

B.

Before we evaluate the evidence in light of this standard, we must review the legal components of Aloe's claim. In a negligence action under Pennsylvania law, "[t]he plaintiff has the burden of proving the negligence of the defendant as the legal cause of the accident." *Rice v. Shuman*, 519 A.2d 391, 395 (Pa.

1986). This places upon the plaintiff the obligation of "both coming forward with the evidence of the defendant's negligence and persuading the factfinder on this issue." *Id.* The *Restatement (Second) of Torts* § 431 (1979) sets forth the definition of legal cause:

> The actor's negligent conduct is a legal cause of harm to another if
>
> (a) his conduct is a substantial factor in bringing about the harm, and
>
> (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

Pennsylvania has adopted the Restatement analysis. *Vattimo v. Lower Bucks Hospital, Inc.*, 502 Pa. 241, 246, 465 A.2d 1231, 1233 (1983); *Ford v. Jeffries*, 474 Pa. 588, 594, 379 A.2d 111, 114 (1977).

The question of causation is ordinarily for the jury. *Ford*, 474 Pa. at 595, 379 A.2d at 114; *see generally* W. Keeton, *Prosser and Keeton on the Law of Torts* § 41, at 269 (1984). However, "if [the] plaintiff has failed to establish in the case in chief evidence that would support a finding that the defendant's negligence was a legal cause of plaintiff's injuries a non-suit would be appropriate as there would be no question to present to a jury." *Rice*, 519 A.2d at 395-96 n.5.

C.

After a thorough review of the testimony in this case, we conclude that there was not sufficient proof of causation to allow Aloe's negligence claim to go to the jury. Aloe's theory was that "a fire originated within the . . . 475B Michigan hi-lift tractor as a result of a ruptured hydraulic pressure line." App. at 8a. Aloe contended that the ruptured line was due to Clark's negligence in manufacturing the tractor shovel. *Id.*

The critical question is whether Aloe supported its allegation regarding the cause of the fire.

Aloe relied solely on the testimony of one person to establish causation. He was Michael Drewnoski, a sales representative for Mendes & Company, whose position required him to determine the costs of repairing and replacing damaged equipment. Over Clark's objections, the district court allowed Drewnoski to give expert testimony regarding the cause of the tractor shovel fire. Drewnoski's opinion was that the fire was caused by a leak in one of the hydraulic lines. App. at 318a. This testimony presents the threshold question of whether Drewnoski was competent to serve in this expert witness capacity.

Guiding us are settled legal precepts. An expert witness must have such skill, knowledge, or experience in the field as to make it appear that his opinion will probably aid the trier of fact in his search for the truth. *Caisson Corp. v. Ingersoll-Rand Co.*, 622 F.2d 672, 682 (3d Cir. 1980); *Universal Athletic Sales Co. v. American Gym, Recreational & Athletic Equipment Corp.*, 546 F.2d 530, 537 (3d Cir. 1976), *cert. denied*, 430 U.S. 984 (1977); *see also* Rule 702, F.R. Evid. The determination of competency of an expert witness rests with the discretion of the district court. *Caisson Corp.*, 622 F.2d at 682; *Knight v. Otis Elevator Co.*, 596 F.2d 84, 87 (3d Cir. 1979); *Universal Athletic Sales*, 546 F.2d at 537. The Supreme Court has stated that "the trial judge has broad discretion in the matter of the admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous." *Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962).

After carefully reviewing Mr. Drewnoski's credentials, we conclude that the district court abused its discretion by allowing the witness to testify

regarding the cause of the tractor shovel fire. Drewnoski was not an engineer. He had no experience in designing construction machinery. He had no knowledge or experience in determining the cause of equipment fires. App. at 300a. He had no training as a mechanic. He had never operated construction machinery in the course of business. *Id.* at 303a-04a. He was a salesman, who at times prepared damage estimates.

We are well aware of "the liberal policy of permitting expert testimony which will 'probably aid' the trier of fact." *Knight*, 596 F.2d at 87. But, at a minimum, a proferred expert witness on causation must possess skill or knowledge greater than the average layman in determining causation. Drewnoski did not. We therefore conclude that the district court abused its discretion in allowing him to testify as an expert on the cause of the tractor shovel fire. *See, e.g., Higginbotham v. Volkswagenwerk Aktiengesellschaft*, 551 F. Supp. 977 (M.D. Pa. 1982) (investigating officer not qualified to offer opinion as to movement of body inside vehicle even though officer had experience as accident investigator, where officer had only minimal training in accident reconstruction, physics, and the movement of bodies), *aff'd mem.*, 720 F.2d 669 (3d Cir. 1983); *Globe Indemnity Co. v. Highland Tank and Manufacturing Co.*, 345 F. Supp. 1290 (E.D. Pa. 1972) (neither electrical engineer nor industrial hygienist was qualified to testify as an expert on the design of molasses storage tank, where neither witness had any prior experience or observational knowledge in the field of storage tank design), *aff'd mem.*, 478 F.2d 1398 (3d Cir. 1973).

D.

Aside from the testimony of Drewnoski, Aloe did not present any evidence from which a jury might

reasonably conclude that Aloe's tractor shovel fire was caused by a ruptured hydraulic line. Viewing the record in the case in the light most favorable to the plaintiff, we do not find a "minimum quantity" of evidence of causation. Accordingly, we conclude that the district court should not have submitted Aloe's negligence claim to the jury. But this does not end our inquiry. We must now decide if Clark was entitled to judgment n.o.v. on this issue alone.

IV.

We are faced with circumstances in which the totality of causation evidence, minus the Drewnoski testimony, was insufficient to send the case to the jury. Under such circumstances, it is clear that in considering a post-trial motion for a new trial the court is free to consider the abridged record, that is, in this case, a reconstructed record that did not include Drewnoski's testimony. *See Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 249, 251 (1940). But the same clarity in the law is not present when the post-trial motion is for judgment n.o.v. This question has not been presented to us heretofore and, indeed, in this case we raise it *sua sponte* because the appellee, Aloe, has not responded to Clark's argument that it was entitled to judgment n.o.v. because of the incompetency of Drewnoski's testimony.

The United States Courts of Appeals for the Fifth and Eighth Circuits, and the Supreme Court of New Mexico, suggest that although a truncated record may properly be considered in a motion for a new trial, the court must consider the entire record, replete with incompetent evidence, in deciding the judgment n.o.v. question. *See Dixon v. International Harvester Co.*, 754 F.2d 573, 580 (5th Cir. 1985); *Sumitomo Bank of California v. Product Promotions, Inc.*, 717 F.2d 215, 218 (5th Cir. 1983); *Midcontinent Broadcasting Co. v.*

North Central Airlines, Inc., 471 F.2d 357, 358 (8th Cir. 1973); *Townsend v. United States Rubber Co.*, 74 N.M. 206, 392 P.2d 404, 406 (1964).

We have carefully examined the opinions from the Fifth and Eighth Circuits, and New Mexico, but regrettably we find no reasoned elaboration to support their thesis that "[i]n ruling on the sufficiency of evidence the trial court must take the record as presented to the jury and cannot enter judgment on a record altered by the elimination of incompetent evidence." *Midcontinent Broadcasting Co.*, 471 F.2d at 358. The longest discussion appears in New Mexico's *Townsend* case which, upon analysis, is one conclusory statement piled on another. *Townsend*, 392 P.2d at 406. What results is a classic case of precedential inbreeding where decisions multiply and parrot a holding, with no court pausing, first, to identify the competing social, public, or private interests involved, then, to resolve the possible conflicts, and finally, to give public reasons for the resolution.

The closest to an explanation forthcoming in the cases appears in *Midcontinent Broadcasting Co.*:

> The subsequent ruling, after the verdict, that the expert opinion was not admissible after it had been originally received and considered by the jury, placed plaintiff in a relative position of unfair reliance. If plaintiff had been forewarned during the trial that such testimony was not admissible it conceivably could have supplied further foundation or even totally different evidence. Under these circumstances the grant of the judgment n.o.v. was not a proper remedy.

471 F.2d at 359. This explanation, of course, does not address either the competing reliance concerns of the defendant, or the homespun axioms that a litigant is

entitled to only one bite of the apple or to only three strikes at bat.

In any event, we are not required to resolve this issue here, and indeed, we prefer not to because the question was not addressed by counsel by brief or argument on appeal or in the post-trial motions. We need not meet this issue because we hold that, as a matter of law, the plaintiff was not entitled to the damages it sought.

V.

Our approach requires us to decide if fire damages to Aloe's tractor shovel may be recovered by the purchaser from the vendor on a theory of negligence under Pennsylvania law. We exercise plenary review over this issue. *Universal Minerals, Inc. v. C. A. Hughes & Co.*, 669 F.2d 98, 102 (3d Cir. 1981).

A.

It cannot seriously be questioned that, if presented timely, Aloe, the buyer of an allegedly defective product, and its insurer had rights and remedies against Clark, the manufacturer, under contract and Uniform Commercial Code precepts. Nor is it disputed that Aloe suffered neither personal injury nor property damage other than loss of the purchased product. Since Aloe sought damages only for the replacement cost of the defective product, its loss was purely economic. *See East River S.S. Corp. v. Transamerica Delaval, Inc.*, ___ U.S. ___ (54 U.S.L.W. 4649, 4652, June 16, 1986); *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d 280, 284 (3d Cir. 1980).

B.

In *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, 652 F.2d 1165 (3d Cir. 1981), we wrestled with the issue of whether Pennsylvania would permit

the purchaser of an allegedly defective product destroyed by a sudden fire to recover damages from the manufacturer in an action founded solely on products liability and negligence theories. At the time of our decision, then, as now, the Pennsylvania Supreme Court had not specifically addressed this issue. This court, speaking through Judge Adams, predicted that the Pennsylvania Supreme Court would distinguish between the type of injury to a defective product that constituted mere economic loss compensable under warranty law, and the type of injury that amounted to the sort of physical harm compensable in tort. In delineating the line between tort and warranty law, Judge Adams stated that "the items for which damages are sought are not determinative"; rather "the nature of the defect and the type of risk it poses are the guiding factors." *Id.* at 1174. Judge Adams further distinguished damages that accrued slowly over time from those which occurred suddenly; because the damages in that case were "the result of a fire -- a sudden and highly dangerous occurrence," the court held that the complaint fell within the policy of tort law. *Id.* at 1174-75.

We applied the *Pennsylvania Glass Sand* rationale in *East River S.S. Corp. v. Delaval Turbine, Inc.*, 752 F.2d 903 (3d Cir. 1985) (in banc), *aff'd on other grounds*, ___ U.S. ___ (54 U.S.L.W. 4649, June 16, 1986). There, in the context of admiralty law, we concluded that damages to a supertanker turbine resulting from normal operation and the gradual and unnoticed deterioration of component parts were not recoverable from the manufacturer in tort. Since the defective turbine "did not pose an unreasonable risk of harm to persons or property," the court held that the plaintiffs "failed to state a cause of action in tort." *Id.* at 909.

Our conclusion in *Delaval Turbine* was affirmed by the Supreme Court for different reasons in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, ___ U.S. ___ (54 U.S.L.W. 4649, June 16, 1986). In *East River*, the Supreme Court, sitting in admiralty, held that "a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself." ___ U.S. at ___, 54 U.S.L.W. at 4653. In so holding, the Court adopted in principle the majority rule of *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), which precludes courts from imposing tort liability on a manufacturer if a defective product injures only itself. The Court labeled our *Pennsylvania Glass Sand* formulation an "intermediate" approach and rejected our position as "unsatisfactory":

> The intermediate positions, which essentially turn on the degree of risk, are too indeterminate to enable manufacturers easily to structure their business behavior. Nor do we find persuasive a distinction that rests on the manner in which the product is injured. We realize that the damage may be qualitative, occurring through gradual deterioration or internal breakage. Or it may be calamitous. . . . But either way, since by definition no person or other property is damaged, the resulting loss is purely economic. Even when the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of its bargain -- traditionally the core concern of contract law.

___ U.S. at ___, 54 U.S.L.W. at 4652.

C.

Because our jurisdiction in this case is founded on diversity of citizenship, we are bound to apply Pennsylvania law to the present controversy. *See Wilson v. Asten-Hill Manufacturing Co.*, 791 F.2d 30, 32 (3d Cir. 1986); *McGowan v. University of Scranton*, 759 F.2d 287, 290 (3d Cir. 1985); *see also Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938). No Pennsylvania Supreme Court decision addresses the instant issue; therefore, we must predict how that court would decide the question. *Wilson*, 791 F.2d at 32; *McGowan*, 759 F.2d at 291. "In attempting to forecast state law, we 'must consider relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand.'" *McGowan*, 759 F.2d at 291 (quoting *McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657, 663 (3d Cir.), *cert. denied*, 449 U.S. 976 (1980)); *see also Erie Castings Co. v. Grinding Supply, Inc.*, 736 F.2d 99, 100 (3d Cir. 1984).

We understand completely that the *East River* holding is not binding on Pennsylvania courts, because the Supreme Court's decision was based on an interpretation of federal admiralty law only. The United States Supreme Court is supreme in matters of federal law; the Pennsylvania Supreme Court is supreme in matters of Pennsylvania law. Nevertheless, we conclude that the United States Supreme Court's analysis is so persuasive that it will be followed by Pennsylvania courts.

D.

In reaching its decision in *East River*, the Court emphasized five considerations: (1) when the defective

product injures only itself the reasons for imposing a tort duty are weak and those limiting remedies to contract law are strong; (2) damage to the product itself is most naturally understood as a warranty claim; (3) contract law is well suited to commercial controversies because the parties may set the terms of their own agreements; (4) warranty law sufficiently protects purchasers by allowing them to obtain the benefit of their bargain; and (5) warranty law has a built-in limitation on liability, whereas tort actions could subject manufacturers to an indefinite amount of damages. ___ U.S. at ___, 54 U.S.L.W. at 4653.

In *East River*, the Court also focused on the realities of the marketplace and recognized the *quid pro quo* of modern arm's length commercial transactions of the character now before us. In the case before us, the business relationship was between a coal mining company, an experienced purchaser and user of excavating equipment, and the manufacturer that supplied the equipment. The Court noted that under similar circumstances, the manufacturer could restrict its liability by disclaiming warranties or limiting remedies under sections 2-316 and 2-719 of the Uniform Commercial Code, 13 Pa. Cons. Stat. §§ 2316, 2719. In exchange, the purchaser bargains to pay less for the product.

On the basis of the foregoing, the Court arrived at a public policy judgment for cases of this type, concluding that it preferred the built-in limitation on damages in a warranty action over the open-ended and indefinite damages available in tort. In the former, the limitation stems from foreseeability and privity; in the latter, "[i]t would be difficult for a manufacturer to take into account the expectations of persons downstream who may encounter its product." ___ U.S. at ___, 54 U.S.L.W. at 4654.

The Court's opinion was not a paste and scissors job that set forth the diverse holdings in myriad cases and then arbitrarily opted for one view over the others. *See, e.g., Pennsylvania Glass Sand*, 652 F.2d 1165, 1170-72 & nn.17, 18 (3d Cir. 1981); *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d 280, 284-90 & n.13 (3d Cir. 1980). The Court heeded the teaching of Lord Mansfield: "The law does not consist in particular instances, though it is explained by particular instances and rules; but the law consists of principles, which govern specific and individual cases as they happen to arise." *R. v. Bembridge*, 22 How. St. Tr. 2, 155 (K.B. 1783). The Court identified, examined, and evaluated controlling dogma, doctrine, and fundamental principles of tort and contract remedies. *See generally* Aldisert, *The House of the Law*, 19 Loy. L.A.L. Rev. 755, 764 (1986) ("The time has come to identify exactly what fundamentals underlie the controversy in each case, and to isolate which is the governing branch of the law's family tree. Our first step in any legal argument must be to look at the tree's trunk and main branches, rather than to concentrate on new twigs that continually sprout in all directions."). For these reasons, we are convinced that the Pennsylvania Supreme Court will adopt the analysis of *East River*.

E.

We recognize that our conclusion may not be considered congruent with two recent cases in the Pennsylvania intermediate appellate court. In *Industrial Uniform Rental Co. v. International Harvester Co.*, 317 Pa. Super. 65, 463 A.2d 1085 (1983), the court embraced the rationale of *Pennsylvania Glass Sand*: "We believe in the validity of the 'type of harm' approach . . . ." *Id.* at 72, 463 A.2d

at 1089; *see also id.* at 72-80, 463 A.2d at 1089-93. In *Johnson v. General Motors Corp.*, 349 Pa. Super. 147, 502 A.2d 1317 (1986), the court followed *Industrial Uniform*'s holding and reaffirmed the rationale of *Pennsylvania Glass Sand*. Moreover, *Johnson* cited our decision in *Delaval Turbine* with approval. *Id.* at 160-61, 502 A.2d at 1323-24. These pronouncements have made our task more uncertain than it otherwise would be, yet do not dissuade us from our ultimate conclusion.

We restate that our role in this case is predictive. *Wilson v. Asten-Hill Manufacturing Co.*, 791 F.2d 30, 32 (3d Cir. 1986). Furthermore, although we must accord proper regard to decisions of intermediate state courts, they are not conclusive. *Connecticut Mutual Life Insurance Co. v. Wyman*, 718 F.2d 63, 65 (3d Cir. 1983). Notwithstanding the pronouncements of the Superior Court of Pennsylvania in *Industrial Uniform* and *Johnson*, we recognize that at the time of these holdings, the Superior Court (and the district court here) did not have the benefit of *East River*; their decisions were made before the United States Supreme Court had flatly rejected our holding and rationale in *Pennsylvania Glass Sand*. We remain convinced that the Pennsylvania Supreme Court would not accept *Industrial Uniform* and *Johnson* in light of the United States Supreme Court's rejection of *Pennsylvania Glass Sand*. Nor has our independent research disclosed any Pennsylvania case that has had the opportunity to consider *East River*. We believe that Pennsylvania courts will reaffirm their lack of hospitality to tort liabilty for purely economic loss. *See Moore v. Pavex, Inc.*, 514 A.2d 137 (Pa. Super. 1986); *Aikens v. Baltimore & Ohio Railroad Co.*, 348 Pa. Super. 17, 501 A.2d 277 (1985).

Appendix A

F.

In our present analysis, a murky trudge through sophisticated nuances gives way to an unencumbered flight to basics. Damage to a product means simply that the customer has received "insufficient product value," *East River*, ___ U.S. at ___, 54 U.S.L.W. at 4653, and maintaining value and quality is precisely the purpose of familiar contractual concepts such as express warranty, implied warranty of merchantability, and warranty of fitness for a particular purpose. With such broad remedial thoroughfares open, the product's purchaser may sue for breach of warranty or reject the product, revoke its acceptance, and sue for breach of contract. These approaches are well suited to commercial controversies because the parties may set the terms of their own liabilities.

We are uncomfortable that the decision we reach today conflicts directly -- on a similar fact pattern -- with our holding in *Pennsylvania Glass Sand* in predicting how Pennsylvania courts will resolve this problem. But in the interim the Supreme Court has spoken; its words are loud and clear. *See* Internal Operating Procedures of the United States Court of Appeals for the Third Circuit, Chapter 8C, at 25; *United States v. Babich*, 785 F.2d 415, 417-18 (3d Cir. 1986), *cert. denied*, ___ U.S. ___ (55 U.S.L.W. 3233, Oct. 6, 1986); *United States v. Walter Dunlap & Sons, Inc.*, 800 F.2d 1232, 1237 n.7 (3d Cir. 1986). As we have said before, we are impressed by the cogent reasoning set forth in its opinion. Moreover, Justice Blackmun has spoken for a unanimous Court. Where, as here, uniform agreement prevailed in both the result and the reasoning, Marshall McLuhan's statement comes to mind -- the medium is the message.

Appendix A

VI.

We have determined that Aloe did not present sufficient evidence of causation to submit its negligence claim to the jury.[2] We have also made a studied conclusion, or perhaps more accurately an educated guess, that Pennsylvania will declare as state law that which the United States Supreme Court has since formulated as federal law. For this reason, we will reverse the district court's denial of Clark's motion for judgment notwithstanding the verdict. We will remand this case to the district court with a direction that it enter judgment in favor of Clark.[3]

---

2. Judge Seitz joins in the judgment of the court solely on the basis of the court's conclusion with respect to causation.

3. In light of our holding on the damages issue, we need not address Clark's additional contentions on appeal.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, *ALOE COAL CO. V. CLARK EQUIPMENT CO.*, NO. 86-3488, MAY 4, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ALOE COAL COMPANY and COMMERCIAL UNION INSURANCE COMPANY

v.

CLARK EQUIPMENT CO.,

Appellant

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge,* SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN and ALDISERT, *Circuit Judges*

The petition for rehearing filed by Aloe Company and Commercial Union Insurance Company in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Appendix B

By the Court,

s/ John J. Gibbons
Chief Judge

Dated: May 4, 1987

APPENDIX C—ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA, *ALOE COAL CO. V. CLARK EQUIPMENT CO.*, CIVIL ACTION NO. 83-1329, SEPTEMBER 29, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSLVANIA

CIVIL ACTION
NO. 83-1329

ALOE COAL COMPANY and COMMERCIAL UNION INSURANCE COMPANY

Plaintiffs

vs.

CLARK EQUIPMENT CO.,

Defendant

ORDER

AND NOW, THIS DAY OF 9/29/1986, upon consideration of plaintiffs' Motion to Mold Jury Verdict to Include Delay Damages, and the response of the defendant thereto, if any, it is hereby ORDERED and DECREED that delay damages under Rule 238 at a rate of 10% per annum shall be added to the jury verdict of $97,500.00 in the within action, accruing on June 2, 1983 and ending on May 12, 1986, in the amount of $28,684.50 resulting in a total judgment against defendant of $126,184.50. Judgment is entered accordingly.

Appendix C

BY THE COURT:

s/ Gerald J. Weber
GERALD J. WEBER, J.

APPENDIX D—ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA, *ALOE COAL CO. V. CLARK EQUIPMENT CO.*, CIVIL ACTION NO. 83-1329, JULY 16, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSLVANIA

CIVIL ACTION NO. 83-1329

ALOE COAL COMPANY and COMMERCIAL UNION INSURANCE COMPANY

Plaintiffs

v.

CLARK EQUIPMENT CO.,

Defendant

ORDER

NOW, this 16th day of July, 1986, having received various post-trial motions from the parties herein, IT IS ORDERED that:

1. Defendants' Motions for JNOV and for New Trial are DENIED. These motions raise no new issues that were not raised and considered at trial.

2. Defendant shall reply to plaintiff's Motion to Mold the Verdict to recover delay damages showing cause why prejudgment interest should not be allowed as claimed by plaintiff *on or before Monday, August 4, 1986.*

Appendix D

s/ Gerald J. Weber
GERALD J. WEBER
United States
District Judge

cc: All Counsel

APPENDIX E—INTERNAL OPERATING PROCEDURES OF THE SUPERIOR COURT OF PENNSYLVANIA

BUSINESS OF THE SUPERIOR COURT OF PENNSYLVANIA

INTERNAL OPERATING PROCEDURES FOR THE SUPERIOR COURT OF PENNSYLVANIA

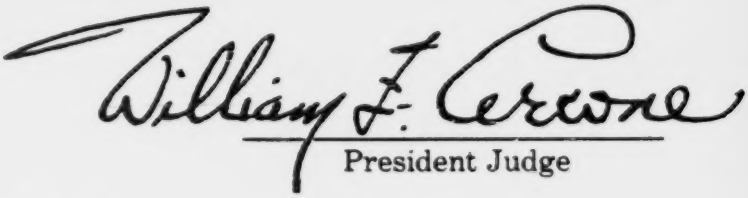
Appendix E

For the information and convenience of the Pennsylvania Bench and Bar, we are happy for the opportunity to publish the Pennsylvania Superior Court Internal Rules of Operation.

These Rules, of course, are supplemental to the Pennsylvania Supreme Court Rules of Appellate Procedure and are structured to meet the administrative responsibilities of our Court.

As it is with all Rules, there will be amendments, additions and innovative suggestions made from time to time in order to achieve the ever present goal of administering a modern, intermediate appellate court.

I extend my deepest appreciation to each of my colleagues who contributed to the formulation of our Internal Rules, and we extend our best wishes to the members of the Pennsylvania Bench and Bar for every success in their endeavors.



July 1983

President Judge

Appendix E

TABLE OF CONTENTS

		Page
I.	APPLICATION OF THE PENNSYLVANIA RULES OF APPELLATE PROCEDURE	1
II.	CONSTITUTION OF THE COURT — DIVISIONS	1
	1. Jurisdiction	1
	2. Court and Divisions	1
	3. Sessions and Assignment of Judges	1
	4. Time and Place of Sessions	2
	5. Business of the Panel	2
	6. Power of a Single Judge	2
III.	ADMINISTRATIVE SUPPORT STAFF	3
	1. Prothonotary	3
	2. Crier	3
	3. Recorder	3
	4. Central Legal Staff	4
IV.	APPELLATE AND PRE-DISPOSITIONAL PROCEDURES	4
	1. Notice of Appeal	4
	2. Case Screening	4
	3. Settlement Conference Program	5
	4. Accelerated Docket Program	5
	5. Pre-Argument Motion and Petition Procedure	6
	6. Interlocutory Appeals by Permission	6
	7. Petition for Review	7
	8. Periodic Non-Pros and Extensions of Time	7
	9. Motions to Quash/Dismiss	8
V.	DISPOSITION OF APPEALS	8
	1. Briefs	8
	2. File, Exhibits and Graphic Aids	8
	3. Amicus Curiae	8
	4. Daily List	9

Appendix E

TABLE OF CONTENTS—(Continued)

Page

5. Oral Argument 9
6. Post-Argument Conference 9
7. Submission Panel 9
8. Preparation and Circulation of Opinions 9
9. Post-Submission Communications 10
10. En Banc Certification 10
11. Petition for Reargument or Reconsideration . 11

VI. ORIGINAL JURISDICTION MATTERS — ELECTRONIC SURVEILLANCE APPLICATIONS 11

Appendix E

BUSINESS OF THE SUPERIOR COURT OF PENNSYLVANIA

INTERNAL OPERATING PROCEDURES

I. Application of the Pennsylvania Rules of Appellate Procedure

The Rules of Appellate Procedure adopted by the Supreme Court of Pennsylvania govern practice and procedure in this Court to the extent applicable. The following procedures are formulated pursuant to Pa. R.A.P. 104 and 3501, and govern the internal operation of the Superior Court.

II. Constitution of the Court — Divisions

1. Jurisdiction.

The Pennsylvania Superior Court is an intermediate appellate court. Its jurisdiction extends to specific interlocutory orders authorized by rule or certified by the trial court and final orders issued in civil and criminal cases from the courts of common pleas, except for those cases within the exclusive jurisdiction of the Supreme Court or Commonwealth Court. Original and discretionary jurisdiction in the Superior Court is very limited. 42 Pa. C.S.A. Sections 741 and 742, Pa. R.A.P. 311, 312, 1311, 1312.

2. Court and Divisions.

All appeals whether argued or submitted, shall be decided by a panel, consisting of three judges which shall represent a quorum of the Court. A hearing or rehearing before the court en banc may be ordered by a majority of judges. The court en banc for rehearing purposes shall consist of an enlarged reargument panel appointed and presided over by the President Judge. A prior decision of a panel of the court may be overruled by a majority decision of an En Banc Panel.

3. Sessions and Assignment of Judges.

The President Judge shall assign the judges to panels and court en banc sessions and shall designate the location

and dates on which they sit. In addition to commissioned judges, senior Superior Court judges and any other judge, specially assigned to the Superior Court by order of the Chief Justice of Pennsylvania, may sit on panels with the same power and authority as are vested in a commissioned judge of the Superior Court. Senior judges of the Superior Court may sit on court en banc sessions as assigned by the President Judge.

4. TIME AND PLACE OF SESSIONS.

The court shall be held in the cities of Philadelphia, Pittsburgh and Harrisburg and special sessions may be scheduled in other counties by decision of the President Judge. Sessions begin at 9:30 a.m. and at 1:30 p.m.

The court shall not hold formal terms but shall be deemed always open for the purpose of docketing appeals and petitions, making motions, filing records, briefs and appendices, filing opinions and entering orders and judgments.

Special sessions may be held at any time or place within the Commonwealth when so ordered by the President Judge.

5. BUSINESS OF THE PANEL.

The President Judge shall designate the Presiding Judge for each panel session. Said Presiding Judge shall record the assignment and disposition of cases before the panel and shall transmit this information to the office of the President Judge. The Presiding Judge shall have the responsibility to see that the work of the panel is completed.

At the conclusion of each panel session, the administrative assistant to the President Judge shall forward to all Judges, the Prothonotary, the Chief Staff Attorney and the Recorder a record of all assignments and other action taken during the session whether en banc or by panel.

6. POWER OF A SINGLE JUDGE.

Except as otherwise provided herein, a single judge, whether commissioned or specially assigned, may entertain and may grant or deny any request for relief which under the

BEST AVAILABLE COPY

Appendix E

Rules of Appellate Procedure may be sought by motion or petition. Generally, however, a single judge, may not rule on the substantive merits of an appeal. No oral argument will be heard on motions or petitions unless ordered by the court or a judge thereof and the court or judge thereof shall fix the time and place for argument.

The President Judge shall appoint and assign members of the Court to serve as motions judges for specific months of the year. All motions and petitions will be entertained by such designated judges.

III. Administrative Support Staff

1. Prothonotary.

The Prothonotary shall maintain offices in Philadelphia, Pittsburgh and Harrisburg, and as the principal non-judicial administrative officer of the Court shall supervise internal administration (e.g., budget preparation, expenditure control, financial accounting, personnel management); review and docket actions filed with the Court; calendar cases for Court sessions; maintain the files and records of the Court; and advise the President Judge on other matters affecting administration.

2. Crier.

The Crier shall open and adjourn the Court; maintain order in the courtroom; assemble and make proper distribution of case briefs and reproduced records; prepare judges' journals and the Prothonotary's journal; maintain list of cases book (date of argument or hearing, judges present, names of counsel for appellant and appellee) and perform related work as required.

3. Recorder.

The Recorder shall maintain accurately kept records of all judges' assignments; maintain a record of the business of all panels; keep a complete set of paperbooks and prepare correspondence to and from the official Superior Court printer.

Appendix E

4. CENTRAL LEGAL STAFF.

The Central Legal Staff shall be comprised of members of the Bar of the Commonwealth of Pennsylvania and shall assist the court in procedural and substantive matters under the supervision, action and direction of the President Judge; Central Legal Staff's responsibilities shall include:

(a) screening all appeals for jurisdictional defects prior to appeals being listed before the Court.

(b) preparing cases for the Court's Accelerated Docket.

(c) reviewing pre-argument applications for relief filed pursuant to the Rules of Appellate Procedure in preparation for presentation of these motions to the Court.

(d) reviewing panel decisions, to insure against the Court's issuing conflicting opinions.

(e) reviewing and preparing memoranda on applications for reargument filed pursuant to Pa. R.A.P. 2542 for distribution to the Court.

IV. APPELLATE AND PRE-DISPOSITIONAL PROCEDURES

1. NOTICE OF APPEAL.

For appeal purposes, the trial court acts as the filing agent for appeals and cross-appeals and the appellate court is the docketing agent. Two copies of the Notice of Appeal, the order for transcript, if any, and the proof of service shall be filed with the clerk of the trial court. Upon receipt of copies of the Notice of Appeal and proof of service from the trial court clerk, the Prothonotary of the Superior Court shall immediately enter and number the appeal upon the docket, notify all parties, and forward to appellant a docketing statement for completion within ten days. See Pa. R.A.P. 3517 for requirements of docketing statements.

2. CASE SCREENING.

Upon study of the docketing statements, if an appeal is determined to be jurisdictionally defective, counsel is in-

formed of the defect by letter. Thereafter, if the appeal is not perfected, the President Judge may sua sponte quash the appeal. If the appeal is perfected, the trial record, briefs and the trial court opinion will be filed as provided by the rules of appellate procedure.

The docketing statements are further reviewed for the selection of cases for both the Settlement Conference and Accelerated Docket Programs.

3. SETTLEMENT CONFERENCE PROGRAM.

All civil appeals filed in the Superior Court shall be subject to selection by the Court for settlement conference. The conferences are scheduled for Pittsburgh and Philadelphia as soon as possible after the filing of the notice of appeal, and are conducted by a judge of the Court. The Court will mail notice of time and location for the conferences to participating counsel approximately three weeks prior to conference. Attendance by counsel is mandatory. In the event that a settlement cannot be reached, the conferencing judge is disqualified from further involvement in the appeal and no records of the conference will be entered in the Court's file. The Court will entertain petitions for admittance into the program filed by counsel and said petitions may be granted if consistent with such considerations as time, scheduling and the nature of the appeal.

4. ACCELERATED DOCKET PROGRAM.

Based on the nature of the appeal, its procedural posture, and the state of the record, the Court may direct that an appeal be placed on an accelerated docket for disposition by a panel. If the case appears to be susceptible to acceleration, the Prothonotary may be notified to secure the expedited preparation of the original record by the trial court pursuant to Pa. R.A.P. 1931. Once the record is transmitted, it will be examined to insure that the initial judgment to accelerate was proper. If necessary, counsel may be notified of an abbreviated briefing schedule. Under Pa. R.A.P. 2151, no reproduced record need be filed. A no-extension, no-continuance policy is adopted for the accelerated docket appeals. Once the

briefs are filed, Central Legal Staff, under supervision, direction and control of the President Judge, will prepare a brief memorandum to accompany each appeal stating the reasons why the appeal was selected for accelerated review. The case will be set to the earliest available session and no more than fifteen accelerated docket cases will be listed per session. The panel, upon review of memorandum and briefs, may decide that the appeal is not proper for acceleration, and in this instance, the panel will so notify counsel to the effect that a full opinion will be filed as in a regular docket appeal. The accelerated docket cases will be discussed and assigned at the decision conference. The disposition of these appeals will be by brief opinions per curiam specifically stating the reasons for the panel's decision. Where possible the decisions will issue within thirty days of argument or submission. In the event that a petition for allowance of appeal is thereafter filed, a memorandum opinion will be filed by the panel pursuant to Pa. R.A.P. 1925(c). Applications for reargument before this Court will be entertained as in any other appeal.

Counsel may petition to be included in or removed from the accelerated docket and same may be granted by a single judge upon good cause shown.

5. PRE-ARGUMENT MOTION AND PETITION PROCEDURE.

After the time for the filing of an answer has passed, all pre-argument applications for relief are presented by designated staff attorneys to the assigned motions judges for disposition and the preparation of an order.

Applications for relief, properly verified and served, may be filed with the Court under Pa. R.A.P. 123. Oral argument is permitted only upon leave of court. A single judge may entertain and dispose of any request for relief sought by application.

6. INTERLOCUTORY APPEALS BY PERMISSION.

With the exception of interlocutory appeals permitted by rule or statute, no immediate appeal of a non-final order is authorized.

Appendix E

To obtain appellate review of a non-final order, not immediately appealable, the aggrieved party must first ask the trial court to formally certify its order as involving a controlling question of law under Pa. C.S.A. Sec. 702. Thereafter, the litigant may file a petition for permission to appeal with the Superior Court. Pa. R.A.P. 1311 et seq. If permission is granted, further proceedings are governed by the rules of appellate procedure. If the trial court refuses to certify its order, then petitioner may file a Petition for Review and must establish that the trial court's refusal to so certify constituted egregious error.

7. Petition for Review.

Judicial review of determination of governmental units may be obtained through the petition for review procedure. Pa. R.A.P. 1501 et seq. This procedure cannot be used either to circumvent the rules governing appellate jurisdiction or to obtain review of an order not immediately appealable. The Petition for Review procedure is now the exclusive procedure for seeking relief in the nature of mandamus, prohibition, quo warranto, declaratory judgment, and replevin.

The form and content of the petition is governed by Pa.R.A.P. 1513. The petition must be filed with the appellate prothonotary within 30 days of the entry of the order of the governmental unit. An answer is permitted under Pa. R.A.P. 1515.

8. Periodic Non Pros and Extensions of Time.

An appeal may be summarily non prossed where the appellant has failed to comply with the rules of appellate procedure, for example, by failing to comply with the briefing schedule. Pa. R.A.P. 3115; Pa. RJ.A. 1091.

If appellant has failed to timely file his brief, the prothonotary will send a letter advising appellant of the necessity to file briefs or request an extension. Failure to request an extension or file briefs will result in the case being placed on a periodic non pros list which is sent to the President Judge for disposition. Requests for extensions must be supported by good reason. In criminal cases involving a court-appointed

attorney, the failure of appellant's counsel to file a brief will result in a remand for appointment of new counsel with a loss of counsel fees or a possible referral to the Pennsylvania Disciplinary Board.

9. MOTIONS TO QUASH/DISMISS.

Motions to quash or dismiss are specified in Pa. R.A.P. 1972. Generally, such motions may be granted in the following situations:

(1) the appeal does not present any reviewable issues;

(2) appellate jurisdiction is either premature or non-existent;

(3) appellant's failure to comply with the appellate rules has resulted in a substantial defect in the brief or record. A motion to quash/dismiss may be decided by a single judge or referred to the entire court for disposition.

V. DISPOSITION OF APPEAL

1. BRIEFS.

See Rules of Appellate Procedure generally. Counsel filing late briefs shall not be permitted to argue before panels. For argued cases briefs are forwarded to panel members two weeks prior to session.

2. FILE, EXHIBITS AND GRAPHIC AIDS.

Counsel may use exhibits and graphic aids during argument. Arrangements must be made by counsel with the crier prior to argument for the use of a blackboard or easel. Copies of all such exhibits must also be appended to the presenting party's brief in compliance with the requirements of Pa. R.A.P. 2134.

3. AMICUS CURIAE.

Appearance and participation by an amicus must be in accordance with Pa. R.A.P. 531. The Court may also request on

its own motion the submission of an amicus brief on any matter before it by or on the behalf of any person, organization or agency.

4. DAILY LIST.

The Prothonotary shall assign to the daily list cases for argument. Counsel shall be notified of the date of argument or submission at least two (2) weeks prior to session.

5. ORAL ARGUMENT.

Oral argument is not a matter of right. *See* Pa. R.A.P. 2315(a); 2311(b) (Post Conviction Hearing Act matters). Subject to considerations of time and scheduling, however, the court will generally permit oral argument. Oral argument will not be permitted when untimely briefs have been filed. Argument will usually be limited to fifteen (15) minutes for each side irrespective of the number of counsel involved.

6. POST-ARGUMENT CONFERENCE.

Following argument of a case, a conference is held by the en banc or panel judges and a preliminary vote is taken. The case is then assigned by the Presiding Judge to a Judge who represents the majority position at conference for the preparation of an opinion.

7. SUBMISSION PANEL.

Appeals which are submitted to the Court on briefs, shall be assigned by the President Judge to a special submission panel for the drafting and circulating of decisions consistent with the procedures herein.

8. PREPARATION AND CIRCULATION OF OPINIONS.

The court shall publish either a signed opinion, an opinion per curiam, or a per curiam order. A per curiam order may be supported by a memorandum opinion which shall not be published and may not be cited as precedent in any brief, argument or subsequent opinion. As to published opinions, if the decision of the court is not unanimous, one or more concurring or dissenting opinions may be published, or there

may be a notation, without an accompanying opinion, that a judge concurs in the result or dissents. After a proposed opinion is drafted, copies are sent, by the author, to the other members of the panel or the court en banc, to Central Legal Staff for conflict clearance, and to the Recorder's Office. The panel or en banc members must provide their written votes to the opinion's author, the other panel members, Central Legal Staff and the Recorder's office.

Memorandum concurring and dissenting opinions are treated the same as memorandum majority opinions, and will not be published in bound volumes unless any two judges of a panel authorize publication. Disputes will be resolved by the President Judge. If the vote is for publication then the majority memorandum opinion will be filed as an Opinion Per Curiam unless its author wishes to sign the opinion.

The opinion is ready for filing if it has commanded a majority and if Central Legal Staff has formally notified that no conflict exists. The majority opinion, along with any accompanying opinions or vote notations, should then be sent to the appropriate Prothonotary's office for filing and publication. The Prothonotary shall thereafter forward copies of filed opinions to all judges.

9. Post-Submission Communications.

After a case has been argued or submitted for decision, no brief, memorandum or letter relating to the case is permitted for submission to the court or individual judge unless it is in compliance with Pa. R.A.P. 2501.

10. en banc Certification.

It is the policy of this Court to dispose of all argued and submitted cases by referring same to panels and to utilize consideration by the Court En Banc only when absolutely necessary. A panel majority may base its request for en banc consideration of a panel case on the following:

(a) a formal conflict has been issued by the central staff and the panel has determined that they are unable to resolve the conflict themselves;

(b) cases where the panel members cannot agree on a majority position;

(c) cases that appear to carry highly significant value as precedent and/or may have a significant impact on the general public.

The panel certification for en banc consideration must be in writing and shall contain a brief statement of facts and a concise but thorough analysis of the issues as well as the reasons for certification for consideration by the Judges of the Court.

11. PETITION FOR REARGUMENT OR RECONSIDERATION.

The grant of Petitions for reargument or reconsideration will be allowed upon the discretion of the Court only when there exist compelling reasons. Such review may be by the panel or specially designated court en banc. Petitions must be filed with the Prothonotary of the Superior Court within fourteen (14) days after the entry of the appellate judgment or order. No answer is permitted in the absence of an appellate court request and no application for reargument will be granted unless an answer has been requested. Pa. R.A.P. 2545.

Reargument or reconsideration may be granted in the following situations where: the panel has rendered a decision inconsistent with another panel's decision; a material misapprehension or oversight of the record, briefs or legal authority has occurred; or an important issue of significant impact is involved.

Second or untimely applications for reargument will not be received. Reargument will be granted upon a majority vote of the entire court. Reconsideration by the panel may be granted sua sponte by the panel members. The grant of reconsideration or reargument vacates the prior order of the panel entered in the case.

V. ORIGINAL JURISDICTION MATTERS ELECTRONIC SURVEILLANCE APPLICATIONS

An application for electronic surveillance, pursuant to 18 Pa. C.S.A. Sec. 5701 et seq., must be made upon the personal

oath or affirmation of the Attorney General or the District Attorney of the county wherein the interception is to be made. A request to submit an application to the Court must be directed to the Prothonotary, who will then secure the assignment of a judge, set an ex parte hearing date and time, and issue a confidential docket number.

The applicant should submit the application, affidavit and proposed order to the assigned judge in chambers. This ex parte proceeding need not be on the record if all the necessary information required by the judge is contained within the four corners of the application. However, any additional testimony or explanation, if supplied orally, must be made of record. A tape recorder or court reporter may be utilized. The Judge should direct the court reporter to transcribe the proceedings as expeditiously as possible and to submit the stenographic notes and original transcript to the Court for sealing at the earliest possible moment. The Judge should instruct all present concerning the need for confidentiality.

In the event the Judge requires the applicant to provide additional testimony or documentary evidence, such additional matters must be presented by the Attorney General or the District Attorney and not a designee. Where, pursuant to Sec. 5710(b) the Judge requests additional information about an informant, such proceedings must be on the record; however, the name of the informant must remain confidential.

The Judge should note on the order the date and time at which it was signed. The original application, affidavit and order should be placed in an envelope and sealed by the Judge. The seal should be in the form of an order of court and affixed to the envelope in such a manner as to prevent the removal of the contents without physically disturbing the seal. The confidential docket number should be placed on the envelope. The seal should set forth the following:

(a) contents of the envelope;

(b) the location at which custody of the sealed item should be maintained;

(c) date, time and location of the signing of the sealing order;

(d) signature of the judge;

Appendix E

At the time the original order is signed, a duplicate original should also be signed for presentation to the communications common carrier.

The judge should then mail the envelope, after inserting it in another envelope marked, "Confidential," to the Prothonotary's Office in Philadelphia. The Prothonotary is to docket the sealed envelope with order impounding same, and store the envelope in a safe or vault until further direction from the Court.

Procedures for extension, renewal, verbal authorization and reporting requirements are governed by the Act.

The thirty day reports required by the Pennsylvania Court Administrator's Office are in substance the same as those required by the United States Administrative Office. The form which is required for these reports, may be obtained from the federal Administrative Office. The Attorney General or District Attorney's Office is responsible for obtaining these forms from Washington. The initial information is to be completed by the Attorney General, District Attorney or their designee, then reviewed and signed by the Judge. The front sheet is to be forwarded to Washington. The second sheet is for the Judge's records, and the remaining sheets are for the Attorney General or District Attorneys' annual reports as required by 18 U.S.C. Sec. 2519 and 18 Pa. C.S.A. Sec. 5723(b). A copy of the first ply may be made by the Judge's office and forwarded to the Pennsylvania Administrative Office as a thirty-day report. A copy should also be forwarded to the President Judge's office for record keeping purposes.

FILED
AUG 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-182

In the Supreme Court of the United States

October Term 1987

ALOE COAL COMPANY AND
COMMERCIAL UNION INSURANCE COMPANY,
Petitioners,

vs.

CLARK EQUIPMENT COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Brief of Respondent

ARTHUR R. GORR, ESQUIRE
A member of the Bar of this Court

Attorney for Respondent
GORR, DELL & LOUGHNEY
628 Frick Building
Pittsburgh, PA 15219

COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Is the petitioners' argument moot?

2. Did the Court of Appeals apply the Erie Doctrine?

TABLE OF CONTENTS

Page

COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

COUNTER STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT

I. Plaintiffs' Petition for Certiorari is moot 3

II. The Court of Appeals applied the Erie Doctrine to the issue in question 4

CONCLUSION 9

TABLE OF AUTHORITIES

CASES CITED:

Page

Commissioner v. Estate of Bosch, 387 U.S. 456 (1967) 7

Cornell Drilling Co. v. Ford Motor Co., 241 Pa. Super. 129, 359 A.2d 822 (1976) 4

East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. ____, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986) 8

Fireman's Fund American Insurance Co. v. Burns Electric Security Services, 93 Ill. App. 3d 298, 417 N.E. 2d 131 (1981) 6

Industrial Uniform Rental Co. v. International Harvester Co., 317 Pa. Super. 65, 463 A.2d 1085 (1983) 4

Johnson v. General Motors Corp., 349 Pa. Super. 147, 502 A.2d 1317 (1986) 5

King v. Order of Travelers, 333 U.S. 153 (1948) 7

Lobianco v. Property Protection, Inc., 292 Pa. Super. 346, 437 A.2d 417 (1981) 5

MacDougall v. Ford Motor Co., 214 Pa. Super. 384, 257 A.2d 676 (1969) 4

McKenna v. Ortho Pharmaceutical Corp., 622 F.2d 657 (3d Cir.), *cert. denied*, 449 U.S. 976 (1980) 7

National Surety Corp. v. Midland Bank, 551 F.2d 21 (3d Cir. 1977) 7

Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165 (3d Cir. 1981) 7

Page

Seely v. White Motor Co., 63 Cal.2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965) 5

Stoner v. New York Life Insurance Company, 311 U.S. 464 (1940) 7

Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 152 (Minn. 1981) 5

Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966) 5

COUNTER STATEMENT OF THE CASE

At trial plaintiffs proceeded on two theories, negligence and strict liability. The trial judge ruled that plaintiffs did not prove the existence of a defect in the product and granted defendant's motion for a directed verdict on the issue of strict liability. Plaintiffs did not appeal from this ruling.

The negligence issue went to the jury which found Clark to be 65 percent negligent and plaintiff to be 35 percent negligent.

Petitioner's statement does not reveal that Clark's appeal to the Third Circuit raised, inter alia, the improper admission into evidence of opinion testimony of an expert not qualified to give such testimony. Absent such testimony, the plaintiff presented insufficient evidence of causation of the fire and resulting damages. The Court of Appeals ruled in Respondent's favor on the issue of lack of qualification of plaintiff's sole witness as to causation and found that there was not sufficient proof of causation to allow Aloe's negligence claim to go to the jury. This finding was unanimous. On this basis, the Court of Appeals remanded to the District Court for entry of judgment for defendant. Petitioner has not challenged this ruling.

The Court of Appeals also found that plaintiffs had no cause of action in tort because plaintiffs' claim against the seller of the product, was limited to damage which the product caused to itself.

The Court of Appeals denied plaintiffs' Motion for Rehearing Before the Court En Banc.

SUMMARY OF ARGUMENT

This issue asserted in plaintiffs' petition is moot. Even if petitioners were correct, the ruling below is supported by the Court of Appeals' determination of an independent issue (insufficiency of evidence as to causation), which determination is not challenged by plaintiffs' petition.

Petitioners are incorrect in their assertion that the Court of Appeals did not apply Pennsylvania law with regard to the non-existence of a tort remedy for economic loss sustained by the commercial buyer of an allegedly defective product. No Pennsylvania Court has allowed a tort recovery in such situations. The indicators are that the Pennsylvania courts would not allow tort recovery in such situations. These indicators are the holdings and dicta in Supreme and Superior Court decisions and the Superior Court's express approval of majority law which denies tort recovery in such situations. The Court of Appeals' application of Pennsylvania law is presumptively correct.

I. PLAINTIFFS' PETITION FOR CERTIORARI IS MOOT

The Court of Appeals "determined that Aloe did not present sufficient evidence of causation to submit its negligence claim to the jury." (opinion of the Court of Appeals; Appendix A to Plaintiff's Petition for Certiorari 2la; see entire discussion of issue by Court of Appeals 6a to 13a). Accordingly, it remanded with directions to enter judgment for Clark. The court's determination of insufficient evidence of causation is quite independent of the purported Tenth Amendment issues raised by Plaintiff's Petition for Certiorari and is not challenged by plaintiff's petition. The issue asserted in plaintiff's petition is therefore moot.

II. THE COURT OF APPEALS APPLIED THE ERIE DOCTRINE TO THE ISSUE IN QUESTION

The case is in federal court because of diversity of citizenship. The parties and the Court of Appeals are in agreement that under the *Erie* doctrine the substantive law of Pennsylvania applies. The court states "Because our jurisdiction in this case is founded on diversity of citizenship, we are bound to apply Pennsylvania law to the present controversy." (Petition for Certiorari 16a). The Court goes on to cite the guidelines for forecasting state law.

The case involves the commercial buyer[1] and seller of industrial equipment which allegedly injured iteself because it was defective. The suit is in tort. The issue is whether under Pennsylvania law the commercial buyer of industrial equipment has a remedy under tort law when alleged defects in the product cause it to injure itself, or whether the buyer is limited to its contractual remedies under the U.C.C.

The Court of Appeals held that under Pennsylvania law no cause of action in tort exists.

The decision is not inconsistent with any holding of the highest or intermediate court of Pennsylvania.[2] It is consistent with holdings and dicta of both courts. *Industrial Uniform Rental v. International Harvester Co.*, 317 Pa. Super. 65, 463 A.2d 1085 (1983) was a tort action brought by a commercial buyer against a commercial seller of trucks with regard to defects which caused "cracks and failures in the frames" (463 A.2d at 1086). The holding is:

---

[1]Actually the subrograting insurance company of the buyer.

[2]*MacDougall v. Ford Motor Co.*, 214 Pa. Super. 384, 257 A.2d 676 (1969) was a warranty action arising out of a consumer transaction. In *Cornell Drilling Company v. Ford Motor Co.*, 241 Pa. Super. 129, 359 A.2d 822 (1976) the issue was not raised or considered.

no cause of action in tort; suit dismissed. In so holding, the Pennsylvania Superior court expressly approved the majority view of *Seely v. White Motor*, 463 A.2d at 1089. Notably, it approved *Superwood Corp. v. Siempelkamp*, 311 N.W.2d 159, (Minn. 1981) which held:

> Ecomonic losses that airse out of commercial transactions, except those involving personal injury or damage to other property, are not recoverable under the tort-theories of negligence or strict liability. (463 A.2d at 1093).

In a subsequent suit by a disappointed buyer of an automobile, the Superior Court likewise held that no action in tort was stated; *Johnson v. General Motors Corp.*, 349 Pa. Super. 147, 502 A.2d 1317 (1986). That suit involved a consumer transaction, which mars its precedential value as to the instant case.

The Court of Appeals' assessment of Pennsylvania law is in accord with the concurring opinion of the late Chief Justice Eagan of the Pennsylvania Supreme Court in *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966):

> I am in complete accord with the court's action in adopting, as the law of Pennsylvania in tort actions involving products liability, Section 402A of the new Restatement of Torts. However, I would specifically restrict its application to those instances wherein physical harm to a user, or ultimate consumer, or to such individual's property is concerned. In cases involving "economic loss", I believe the warranty provision of the sales law, as set forth in the Uniform Commercial Code, present more appropriate standards (220 A.2d at 855).

It is consistent with the decision of the Pennsylvania Superior Court's decision in *Lobianco v. Property Protection,*

Inc., 292 Pa. Super. 346, 437 A.2d 417 (1981), and most notably with Judge Brosky's concurring opinion quoting the Illinois Supreme Court's decision in *Fireman's Fund American Insurance Companies v. Burns Electronic Security Services*, 93 Ill. App. 3d 298, 417 N.E. 2d 131 (1981):

> When goods are sold, their soundness is the core of the bargain. It is for the parties to decide what the consequences will be if the bargain founders. An entire body of law, contracts—of which product warranties is a part—is available to govern those areas of the relationship concerning which the bargain is silent. There is thus no need for the law of torts to define the right of parties in privity when they have done so themselves. When a buyer loses the benefit of his bargain because the goods are defective, that is, when he suffers economic loss, he has his contract to look to for remedies. *Tort law need not, and should not enter the picture.* (447 A.2d at 427, emphasis supplied).

Petitioners' thesis is that the Court of Appeals is bound to apply the dicta which petitioners glean from a few opinions, such as a footnote in *Kassab v. Central Soya*, 432 Pa. 217, 246 A.2d 848, 854 N.7. *Kassab was not a tort action.* It was a warranty action filed by Mr. and Mrs. Kassab, family farmers; the sole issue was whether privity of contract was a necessary element of a warranty action with regard to some feed which adversely affected a bull. The language relied on is in dicta in a footnote in which the court is discussing a hypothetical consumer action under 402A of the Restatement of Torts, i.e. a defective stove in a kitchen. It is in no way applicable to the existence of a tort claim for a commercial buyer.

In *Industrial Uniform* (supra, 463 A.2d 1085) there is dicta consistent with the Court of Appeals' earlier decision

in *Pennsylvania Glass Sand v. Caterpillar Tractor Co.*, 652 F.2d 1165 (3d cir. 1981), but the issues before the court were not identical and the Pennsylvania Superior Court was not called upon to resolve that precise issue. The *Erie* doctrine does not require a Court of Appeals to apply without question even the holdings of intermediate courts, much less the dicta; *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967), *King v. Order of Travelers*, 330 U.S. 153, 160-61 (1948). Not even the dicta of the highest court is absolutely controlling; *National Surety Corp. v. Midland Bank*, 551 F.2d 21 (3d Cir. 1977); *McKenna v. Ortho Pharmaceutical Corp.*, 662 F.2d 657 (3d Cir.), *cert. denied*, 449 U.S. 976 (1980). It is the law that in diversity cases, federal courts must follow the decisions (not dicta) of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently, and that is particularly true where the intermediate court has determined the precise question in issue in an earlier suit between the same parties and the highest court of the state has refused review; *Stoner v. New York Life Insurance Company*, 311 U.S. 464 (1940), but those circumstances are not present here. The cases relied on by petitioner do not state differently. Most of the *Erie* cases cited by petitioner involve specific issues remote from the issue here, such as whether the *Erie* doctrine applies to equitable relief, application of a federal arbitration statute, differentiating procederal issues from substantive issues, etc.

The Pennsylvania Superior Court in *Industrial Uniform*, in denying a tort recovery to the commercial buyer, noted the *Pennsylvania Glass Sand* decision with respect, but was not called upon to adopt it or reject it and so did neither. It cannot be assumed from the Superior Court's reference to *Pennsylvania Glass Sand* that the Superior

Court, much less the Pennsylvania Supreme Court, would follow it when that precise issue comes before it. It is well known that state courts, especially in issues of first impression, look for guidance to decisions of federal courts, as well as the decisions of courts of sister states. These decisions are not binding, but the reasoning is helpful. The value of *Pennsylvania Glass Sand* as a guide for the Pennsylvania courts has been largely destroyed by the thorough, cogent, scholarly analysis of the U.S. Supreme Court in *East River Steamship Company v. Transamerica Delaval, Inc.* 476 U.S. ____, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986), which, although not binding, is more likely to be followed than *Pennsylvania Glass Sand.* We cannot assume that the Pennsylvania appellate courts would reject the reasoning of the highest court in the land. We cannot assume that the Pennsylvania appellate courts would reject the majority view of its sister states, as reported in *East River Steamship.*

The Court of Appeals has followed the *Erie* guidelines in predicting what the Pennsylvania courts would do with the issue. Its decision does not conflict with any holding of any Pennsylvania court. The decision is in accord with prior Pennsylvania pronouncements, majority law, and the scholarly, unanimous decision of the highest court in the land. There is no reason to disturb its ruling.

CONCLUSION

The Petition For Certiorari should be denied.

Respectfully submitted,

ARTHUR R. GORR
A Member of the Bar
of this Court

GORR, DELL & LOUGHNEY
Attorneys for Respondent

No. 87-182

Supreme Court, U.S.
FILED
SEP 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

ALOE COAL COMPANY and COMMERCIAL UNION INSURANCE COMPANY,

Petitioners,

vs.

CLARK EQUIPMENT COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

STEPHEN A. COZEN
A Member of the Bar of this Court
DAVID J. GROTH
SUSAN M. DANIELSKI
RICHARD C. BENNETT
KATHIE D. KING
COZEN AND O'CONNOR
Attorneys for Petitioners
1900 Market Street
The Atrium - Third Floor
Philadelphia, Pennsylvania 19103
(215) 665-2000

6101
Lutz Appellate Printers, Inc. • NJ (201) 257-6850 • (800) 3 APPEAL • NY (212) 340-4640 • MA (617) 542-1114
DC (202) 783-7288 • PA (215) 925-6500 • USA (800) 5 APPEAL

TABLE OF CONTENTS

Page

The decision of the Third Circuit has resulted in disparate treatment of federal and state court litigants. 1

TABLE OF CITATIONS

Cases Cited:

Aloe Coal Co. v. Clark Equipment Co., 816 F.2d 110 (3d Cir. 1987) 2

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) 2

Hammermill Paper Co. v. C.T. Main Construction, Inc., 622 F. Supp. 816 (W.D. Pa. 1987) 2

Industrial Uniform Rental Co. v. International Harvester Co., 317 Pa. Super. 65, 463 A.2d 1085 (1983) 2

Johnson v. General Motors Corp., 349 Pa. Super. 147, 502 A.2d 1317 (1986) 2

Mack Trucks, Inc. v. Kirby Building Systems, Inc., Civil Action - Law No. 84-C-406 (C.P. Lehigh County, Pennsylvania, July 28, 1987) 2

APPENDIX

Appendix A—Order and Opinion of the Court of Common Pleas of Lehigh County, Pennsylvania at No. 84-C-406 Dated July 28, 1987 . . . . . 1a

No. 87-182

In The

Supreme Court of the United States

October Term, 1987

ALOE COAL COMPANY and COMMERCIAL UNION INSURANCE COMPANY,

Petitioners,

vs.

CLARK EQUIPMENT COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS

THE DECISION OF THE THIRD CIRCUIT HAS RESULTED IN DISPARATE TREATMENT OF FEDERAL AND STATE COURT LITIGANTS.

The petition for a writ of certiorari urges as a basis for granting the writ the disparate treatment that will be afforded to federal and state court litigants if the decision of the Third

Circuit is allowed to stand (Petition at 15). Petitioners maintain that this disparate treatment is a violation of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), as the influence motivating *Erie* was the constitutional necessity of placing federal diversity litigants on equal footing with their state counterparts.

The disparate treatment which petitioners predicted has already come to pass. In *Hammermill Paper Co. v. C.T. Main Construction, Inc.*, 622 F. Supp. 816 (W.D. Pa. 1987), the district court ruled that it was bound by the Third Circuit's decision in *Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d 110 (3d Cir. 1987), and granted summary judgment dismissing the claim for damage to the product itself. Conversely, in *Mack Trucks, Inc. v. Kirby Building Systems, Inc.*, Civil Action - Law No. 84-C-406 (C.P. Lehigh County, Pennsylvania, July 28, 1987) (Appendix "A"), the court held that it was bound by the Pennsylvania Superior Court decisions of *Industrial Uniform Rental Co. v. International Harvester Co.*, 317 Pa. Super. 65, 463 A.2d 1085 (1983), and *Johnson v. General Motors Corp.*, 349 Pa. Super. 147, 502 A.2d 1317 (1986), and refused to grant summary judgment dismissing claims alleging damage to the product itself. The state court's opinion expressly rejects the Third Circuit's decision in *Aloe Coal*, ruling that the decision is not binding on the state courts and is contrary to binding state precedents.

These decisions provide a poignant example of the impact of the *Aloe Coal* decision on the uniformity that *Erie* requires. This disparate treatment is contrary to established federal precedents and warrants granting the writ.

Respectfully submitted,

STEPHEN A. COZEN
(A Member of the Bar of this Court)
DAVID J. GROTH
SUSAN M. DANIELSKI
RICHARD C. BENNETT
KATHIE D. KING
COZEN AND O'CONNOR
Attorneys for Petitioners

APPENDIX A—ORDER AND OPINION OF THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA AT NO. 84-C-406 DATED JULY 28, 1987

COURT OF COMMON PLEAS OF LEHIGH COUNTY

CIVIL ACTION—LAW

No. 84-C-406

MACK TRUCKS, INC.,

Plaintiff

v.

KIRBY BUILDING SYSTEMS, INC., RAY BRACEY CONSTRUCTION, INC., and LEE C. EVERETT, d/b/a, EVERETT ASSOCIATES,

Defendants

and

FUNARI & BROGNA CO., QUEEN CITY CONSTRUCTION CORP., KRAMER STEEL CORP., et al,

Additional Defendants

ORDER

Now, this 28 day of July, 1987, upon consideration of the motion for summary judgment filed by the defendant Kirby Building Systems, Inc. and following oral argument on the matter,

Appendix A

IT IS HEREBY ORDERED that said motion is denied.

BY THE COURT

s/ John E. Backenstoe
JOHN E. BACKENSTOE, P.J.

Appendix A

COURT OF COMMON PLEAS OF LEHIGH COUNTY

CIVIL ACTION—LAW

No. 84-C-406

MACK TRUCKS, INC.,

Plaintiff

v.

KIRBY BUILDING SYSTEMS, INC., RAY BRACEY CONSTRUCTION, INC., and LEE C. EVERETT, d/b/a, EVERETT ASSOCIATES,

Defendants

and

FUNARI & BROGNA CO., QUEEN CITY CONSTRUCTION CORP., KRAMER STEEL CORP., et al,

Additional Defendants

APPEARANCES:

GERARD F. BELZ, JR., ESQUIRE,with him
COZEN and O'CONNOR,
On behalf of the Plaintiff

MARK H. SCOBLIONKO, ESQUIRE, with him
SCOBLIONKO, SCOBLIONKO, MUIR &
BARTHOLOMEW,

Appendix A

On behalf of Kirby Building Systems, Inc.

HERBERT M. RAFNER, ESQUIRE, with him BUTZ, HUDDERS, TALLMAN, STEVENS & JOHNSON,
On behalf of Lee C. Everett, d/b/a Everett Associates

ROBERT V. RITTER, JR., ESQUIRE,with him SNYDER, DOLL & SCHANTZ, P.C.
On behalf of Additional Defendant Queen City Construction Corp.

NICHOLAS NOEL, III, ESQUIRE, with him TEEL, STETTZ, SHIMER & DiGIACOMO, LTD.,
On behalf of Additional Defendant Warren-Ehret-Linck Corp.

OPINION

JOHN E. BACKENSTOE, P.J.

On February 27, 1985, this court granted in part and denied in part a motion for summary judgment filed by the defendant Kirby Building Systems, Inc. Specifically, we granted the motion with respect to the plaintiff's breach of warranty claim and denied the motion with respect to the claims for negligence and product liability. We based our decision on the Third Circuit's decision in *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, 652 F.2d 1165 (3rd Cir. 1981). The defendant Kirby filed a second motion for summary judgment with respect to the claims for negligence and product liability by virtue of the Third Circuit's

recent decision in *Aloe Coal Company and Commercial Union Insurance Company v. Clark Equipment Co.*, 816 F.2d 110 (3d Cir. 1987). For the reasons expressed herein, we must deny the defendant Kirby's second motion for summary judgment.

The *Aloe Coal Company* decision directly conflicts with the holding in *Pennsylvania Glass Sand* in predicting how Pennsylvania courts will resolve the issues involved in this case. The *Aloe Coal Company* decision merely attempts to predict what the Pennsylvania courts would do in light of the United States Supreme Court decision in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, ____ U.S. ____, 106 S.Ct. 2295, 90 L.Ed.2d 865, 54 U.S.L.W. 4649 (1986). However, the *East River* holding is not binding on Pennsylvania courts because the Supreme Court's decision was based on an interpretation of federal admiralty law only. *Aloe Coal Company, supra* at 117.

As a trial court, we are bound to follow the law as articulated by the appellate courts of Pennsylvania. *Commonwealth v. Acquaviva*, 187 Pa. Super. 550, 145 A.2d 407 (1959). The Pennsylvania Superior Court has followed the rationale of the Third Circuit's decision in *Pennsylvania Glass Sand* in the cases of *Johnson v. General Motors Corp.*, 349 Pa. Super. 147, 502 A.2d 1317 (1986) and *Industrial Uniform Rental Co. v. International Harvester Co.*, 317 Pa. Super. 65, 463 A.2d 1085 (1983). Since Pennsylvania law has not changed since *Pennsylvania Glass Sand* was decided and the Pennsylvania courts have not deviated from its application, *Pennsylvania Glass Sand* states current Pennsylvania law in regard to the issues presently before us. Since our opinion on the defendant Kirby's first motion for summary judgment was based on the rational of *Pennsylvania Glass Sand*, which remains the law in Pennsylvania regardless of the holding in *Aloe Coal Company*, we affirm our original

order and opinion and deny the defendant's motion for summary judgment.

No. 87-182

FILED
SEP 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

ALOE COAL COMPANY and COMMERCIAL UNION INSURANCE COMPANY,

Petitioners,

vs.

CLARK EQUIPMENT COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

STEPHEN A. COZEN
A Member of the Bar of this Court
DAVID J. GROTH
SUSAN M. DANIELSKI
RICHARD C. BENNETT
KATHIE D. KING
COZEN AND O'CONNOR
Attorneys for Petitioners
1900 Market Street
The Atrium - Third Floor
Philadelphia, Pennsylvania 19103
(215) 665-2000

6101
Lutz Appellate Printers, Inc. • NJ (201) 257-6850 • NY (212) 840-4640 • PA (215) 925-6500 MA (617) 542-1114 • DC (202) 783-7288 • USA (800) 5 APPEAL

TABLE OF CONTENTS

Page

The Petition for Writ of Certiorari Is Not Moot 1

TABLE OF CITATIONS

Cases Cited:

Aloe Coal Co. v. Clark Equipment Co., 816 F.2d 110 (3d Cir. 1987) 3, 4, 5

Dixon v. International Harvester Co., 754 F.2d 573 (5th Cir. 1985) 5

Midcontinent Broadcasting Co. v. North Central Airlines, Inc., 471 F.2d 357 (8th Cir. 1973)..... 6

Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940) 6

Sumitomo Bank of California v. Product Promotions, Inc., 717 F.2d 215 (5th Cir. 1983) 5, 6

Townsend v. United States Rubber Co., 74 N.M. 206, 392 P.2d 404 (1964) 6

No. 87-182

In The

Supreme Court of the United States

October Term, 1987

ALOE COAL COMPANY and COMMERCIAL UNION INSURANCE COMPANY,

Petitioners,

vs.

CLARK EQUIPMENT COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

THE PETITION FOR WRIT OF CERTIORARI IS NOT MOOT

Respondent Clark Equipment Company argues that the Petition for Writ of Certiorari is moot because "the ruling below is supported by the Court of Appeals' determination of an independent issue (insufficiency of evidence as to causation)" (Brief of Respondent at 2). According to Clark:

> The Court of Appeals ruled in Respondent's favor on the issue of lack of qualification of plaintiff's sole witness as to causation and found that there was not sufficient proof of causation to allow Aloe's negligence claim to go to the jury. This finding was unanimous. On this basis, the Court of Appeals remanded to the District Court for entry of judgment for defendant.

Id. at 1.

This is totally incorrect for two reasons. First, the Third Circuit did not remand on the basis of the causation issue. The *only* basis for reversing the trial court's denial of Clark's motion for judgment n.o.v. was the Court of Appeals' conclusion that damage to the product itself is not recoverable in tort. Second, and equally important, petitioner Aloe Coal Company would be entitled to a new trial should this Court reverse the Third Circuit and hold that Pennsylvania law does allow recovery for damage to the product itself.

I.

While the Third Circuit did remand with directions to enter judgment for Clark, it did *not* do so on the basis of causation. Indeed, the Court of Appeals *refused* to remand for entry of judgment on this basis, for it expressly declined to decide whether Clark was entitled to judgment n.o.v. on the causation issue alone. In the words of Judge Aldisert:

> Viewing the record in the case in the light most favorable to the plaintiff, we do not find a "minimum quantity" of evidence of causation. Accordingly, we conclude that the district court should not have submitted Aloe's negligence claim

> to the jury. But this does not end our inquiry. We must now decide if Clark was entitled to judgment n.o.v. on this issue alone.
>
> * * *
>
> [W]e are not required to resolve this issue here, and indeed, we prefer not to because the question was not addressed by counsel by brief or argument on appeal or in the post-trial motions. We need not meet this issue because we hold that, as a matter of law, the plaintiff was not entitled to the damages it sought.

Aloe Coal Co. v. Clark Equipment Co., 816 F.2d 110, 115, 116 (3d Cir. 1987).

The *only* basis for reversing the District Court's denial of Clark's motion for judgment n.o.v. was the Third Circuit's conclusion that Aloe Coal cannot recover for damage to the product itself.[1]

II.

The causation issue revolved around the testimony of Aloe Coal's expert, Michael Drewnoski. As the Court of Appeals' opinion explains:

> Aloe relied solely on the testimony of one person to establish causation. He was Michael

---

1. The Court of Appeals concludes its opinion by stating: (1) that damage to the product itself is not recoverable, and (2) "*[f]or this reason,* we will reverse the district court's denial of Clark's motion [.]" 816 F.2d at 119 (emphasis added).

> Drewnoski, a sales representative for Mendes & Company, whose position required him to determine the costs of repairing and replacing damaged equipment. Over Clark's objections, the district court allowed Drewnoski to give expert testimony regarding the cause of the tractor shovel fire. Drewnoski's opinion was that the fire was caused by a leak in one of the hydraulic lines. App. at 318a.

Id. at 114. The Third Circuit concluded "that the district court abused its discretion by allowing the witness to testify regarding the cause of the tractor shovel fire," *id.*, and it also held that "the totality of causation evidence, *minus the Drewnoski testimony*, was insufficient to send the case to the jury." *Id.* at 115 (emphasis added).

The question, therefore, became whether Clark was entitled to judgment n.o.v. on this issue alone. The inquiry was framed by the court below as follows:

> [I]t is clear that in considering a post-trial motion for a new trial the court is free to consider the abridged record, that is, in this case, a reconstructed record that did not include Drewnoski's testimony. See *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 249, 251 (1940). But the same clarity in the law is not present when the post-trial motion is for judgment n.o.v.

Id.

Judge Aldisert and the other members of the Third Circuit panel did not resolve this question, but the Court of Appeals' opinion implicitly recognized that the only proper cure for the

admission of Drewnoski's testimony would be *a new trial* rather than entry of judgment for Clark. As the court explained:

> We have carefully examined the opinions from the Fifth and Eighth Circuits, and New Mexico, but regrettably, we find no reasoned elaboration to support their thesis that "[i]n ruling on the sufficiency of evidence the trial court must take the record as presented to the jury and cannot enter judgment on a record altered by the elimination of incompetent evidence." [*Midcontinent Broadcasting Co. v. North Central Airlines, Inc.*, 471 F.2d 357, 358 (8th Cir. 1973).]
>
> The closest to an explanation forthcoming in the cases appears in *Midcontinent Broadcasting Co.*:
>
> > The subsequent ruling, after the verdict, that the expert opinion was not admissible after it had been originally received and considered by the jury, placed plaintiff in a relative position of unfair reliance. If plaintiff had been forewarned during the trial that such testimony was not admissible it conceivably could have supplied further foundation or even totally different evidence. Under these circumstances the grant of judgment n.o.v. was not a proper remedy.
>
> 471 F.2d at 359.

Id. at 116.[2]

---

2. The Third Circuit also cited *Dixon v. International Harvester Co.*, 754 F.2d 573 (5th Cir. 1985); *Sumitomo Bank of California v. Product Promotions,* (Cont'd)

A new trial is the correct remedy for the erroneous admission of evidence. The most important reason for this rule springs from the different types of error that new trial and judgment n.o.v. are intended to address.

> Each motion, as the rule recognizes, has its own office. The motion for judgment cannot be granted unless, as a matter of law, the opponent of the movant failed to make a case and, therefore, a verdict in movant's favor should have been directed. The motion for a new trial may invoke the discretion of the court insofar as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors and admission or rejection of evidence or instructions to the jury.

Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251 (1940). A new trial is the only available cure for errors in the "admission or rejection of evidence," and a court that chose instead to grant judgment n.o.v. based upon an abridged or reconstructed record would be invading the province of the jury.

As the Eighth Circuit recognized in *Midcontinent Broadcasting Co. v. North Central Airlines, Inc.*, 471 F.2d 357, 359 (1973), any other rule would place a plaintiff such as Aloe Coal in "a relative position of unfair reliance." Had Aloe Coal been forewarned during the trial that Drewnoski's expert testimony was inadmissible, it would have altered its entire trial strategy

---

(Cont'd)
Inc., 717 F.2d 215 (5th Cir. 1983); *Townsend v. United States Rubber Co.*, 74 N.M. 206, 392 P.2d 404 (1964).

in an effort to present other evidence from which the jury could reasonably conclude that the tractor shovel fire was caused by a ruptured hydraulic line in the machine.[3] Aloe could also have supplied "further foundation or even totally different evidence," *id.*, in support of its theory of liability. When coupled with the unchallenged evidence that Aloe Coal did present,[4] this would have amounted to sufficient evidence of causation in the trial court.

---

3. Aloe Coal could have offered Drewnoski as a fact witness, for example. Drewnoski appraised the damage shortly after the fire, and his careful examination of the tractor shovel revealed which parts of the equipment were damaged by the fire. Drewnoski could have testified that the heaviest burning was centered in the area where the hydraulic lines were located (Court of Appeals App. at 310a-319a).

4. During the actual trial, Aloe Coal presented evidence that Clark had knowledge of some *fifty* substantially similar, prior fires in the same model tractor shovel (Court of Appeals App. at 63a-64a, 67a-97a, 107a-109a, 143a-144a, 490a-491a, 520a-522a, 528a-536a, 597a, and 690a). Clark formed an internal task force to investigate and recommend steps to prevent such fires (App. at 460a, 462a, 530a, 576a, 595a-596a, and 599a-602a), and Aloe Coal called to the stand a number of the Clark enqineers involved in this effort, including chief product engineer Chester Reed, chief product safety engineer Walter Black, and engineer Clyde Crandall.

Testimony demonstrated: (1) that the task force concluded that a ruptured hydraulic line could cause the tractor shovel to catch on fire (App. at 530a, 533a-534a, and 536a-544a); (2) that the task force recommended a modification to the machine (App. at 502a-503a, 517a, 548a-549a, and 602a); (3) that no fires had been reported on tractor shovels equipped with this modification (App. at 502a-503a), and (4) that neither Aloe Coal nor the distributor that sold that tractor shovel to Aloe Coal were notified of the fire hazard without the modification or Clark's attempts to prevent such fires (App. at 161a-163a, 166a, 215a-216a, 287a-288a, 382a-383a, 400a-401a, 430a, 554a, and 604a).

In addition, testimony by Aloe Coal employees eliminated Aloe Coal's own negligence in the maintenance and use of the machine as a cause of the fire (App. at 152a, 157a, 178a-186a, 202a-217a, 267a-277a, 579a-582a, 684a, and 686a-698a), and Aloe Coal demonstrated that additional precautions would have been taken had Clark warned of the potential for catastrophic fires (App. at 161a, 165a, and 169a).